91-904

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1991
No. 91- _____

CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC.,

Petitioner,

vs.

CONSTRUCTION LABORERS PENSION
TRUST FOR SOUTHERN CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAMES M. NELSON
Attorney of Record

DIEPENBROCK, WULFF, PLANT & HANNEGAN
300 Capitol Mall, Suite 1700
Post Office Box 3034
Sacramento, CA 95812-3034
Telephone: (916) 444-3910

QUESTIONS PRESENTED FOR REVIEW

1. Did 29 U.S.C. § 1401 permit the district court to order the parties to arbitrate the question of statutory interpretation which determines the existence of the arbitrator's and Court's jurisdiction?

2. Do the presumptions in 29 U.S.C. § 1401 favoring multi-employer plans like Construction Laborers Pension Trust for Southern California (hereafter "CLPT") violate the due process rights of Concrete Pipe and Products by denying access to an impartial decision maker?

3. Does 29 U.S.C. § 1383 permit respondent multi-employer plan to convert a pre-MPPAA complete cessation of the covered operations into a post-MPPAA withdrawal?

4. Do the provisions of the Multi-Employer Pension Plan Amendments Act (hereafter "MPPAA") violate the Fifth Amendment rights of Concrete Pipe and Products, *as applied*, by retroactively imposing withdrawal liability on an employer who never had employees vested in the pension plan and whose collective bargaining agreements specifically limited liability to contributions made?

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The only parties to the action are those listed in the caption. Petitioner Concrete Pipe and Products has no subsidiaries, and its parent corporation is Concrete Pipe and Products, Inc. Respondent CLPT is a Taft-Hartley Trust Fund, and to the best of petitioner's knowledge, has no parent or subsidiaries.

E. MPPAA Violates the Fifth Amendment Rights of Employers like Concrete Pipe and Products Where There is no Rational Connection Between the Expectation of the Parties and the Resulting Withdrawal Liability and None of the Unfunded Vested Liability in the Plan Can be Attributed to the Withdrawing Employer 16

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I
OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

A portion of an early phase of this case is described in *Construction Laborers Pension Trust v. Cen-Vi-Ro Concrete Pipe and Products Company Inc.*, 776 F.2d 1416 (9th Cir. 1985). The only other published reference in this case is the table entry on 936 F.2d 576 (9th Cir. 1991).

II
THE SUPREME COURT'S JURISDICTION

The statutory provision believed to confer jurisdiction on this court by writ of certiorari is 28 U.S.C. § 1254(1). The jurisdiction of this court is invoked pursuant to Supreme Court rule 10.1(a) and (c). Judgment on appeal in this case was entered on June 27, 1991. A timely petition for rehearing and suggestion for rehearing *en banc* was filed, and both the petition and the suggestion were denied by the Ninth Circuit Court of Appeals on September 24, 1991.

III
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

This case involves U.S. Const. Amendment V, various provisions of the Multi-Employer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1381, *et seq.* and 29 C.F.R. § 2647.8. The full text of these constitutional provisions, applicable statutes and regulations is set forth in the appendix pursuant to Supreme Court Rule 13.1 (f).

IV
STATEMENT OF THE FACTS

This case presents a number of significant questions about the assessment of withdrawal liability under the Employee Retirement Income Security Act of 1974 (ERISA) and the Multi-Employer Pension Plan Amendments Act ("MPPAA"). Consistent with Supreme Court Rule 14(i), the District Court's asserted basis for federal jurisdiction was 28 U.S.C. § 1331, 29 U.S.C. §§ 1401 and 1451(c). From the inception of this litigation in the fall of 1982 through the present, there have been no significant disputed facts. (*See* C.R. 49).[2]

[2]All "C.R." references are to the clerk's record on appeal to the Ninth Circuit in Case 82-5184 originally in the United States District Court for the Central District of California, unless otherwise indicated. There are, however, three District Court cases which comprise this dispute. This fact does not appear to have any substantive impact on any of the issues in the case or on any of the questions on which review is sought.

A. **The Parties**

Petitioner was created to manufacture and sell concrete pipe in California. Assets with which the pipe manufacturing business was to be conducted were purchased from a totally separate entity during 1976, four years prior to the enactment of MPPAA.[3] (C.R. 124, Company Exhibit 14). The assets purchased included two plants with accompanying manufacturing equipment. One plant was located in Southern California near the town of Shafter (the "Shafter Plant") and the other was located in Northern California near Sacramento. Only the Shafter Plant was covered by a union contract requiring contribution to Respondent. Concrete Pipe and Products marketed its pipe throughout the state during all times relevant to this dispute.

Respondent Construction Laborers Pension Trust for Southern California ("CLPT") is a multi-employer pension trust which was established in 1962. (C.R. 49, para. 2).

CLPT is operated and governed by a board of trustees who owe fiduciary duties to the participants of the plan under 29 U.S.C. § 186 and under ERISA, 29 U.S.C. § 1101, *et seq.* CLPT is formed and governed under a trust agreement entered into between the Southern California District Counsel of Laborers (the "Union") and several multi-employer associations. (C.R. 49, para. 6). The CLPT board of trustees is selected by the Union and the multi-employer associations. (C.R. 49, para. 6). These collective bargaining agreements require signatory employers to make contributions to CLPT for each hour worked by the employee within the bargaining unit covered by the union contract. (C.R. 49, para. 7).

Concrete Pipe and Products is not now nor has it ever been a member of any of the multi-employer associations which appoint the trustees of CLPT. (C.R. 49, para. 29). No shareholder, officer, director, agent, or representative of Concrete Pipe and Products has ever had any participation in (a) the investment decisions on assets of CLPT; (b) CLPT trustee decisions to adjust pension benefit levels; (c) the decisions affecting CLPT's administrative costs; or (d) the selection of actuarial or accounting assumptions or methods on which the withdrawal liability in this dispute has been calculated. (C.R. 49, para. 28).

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[3] The District Court affirmed the arbitrator's finding that this asset sale did not shift withdrawal liability of the Seller to Concrete Pipe and Products, and this issue was not appealed by CLPT. (*See* C.R. 127 p.8)

Concrete Pipe and Products was, at one time, a signatory to a collective bargaining agreement requiring contributions into CLPT. Pursuant to the agreement, Concrete Pipe and Products paid a total of $102,656.68 into CLPT. (C.R. 49, para. 10). The collective bargaining agreement did not guarantee or specify any certain pension benefit level for pension beneficiaries. (C.R. 49, para. 31). The CLPT trust agreement specifically provides that each employer's liability to the plan is limited to that required as contributions to the fund pursuant to the individual collective bargaining agreements. (C.R. 49, para. 32 (Declaration of Trust, Article 4). Pursuant to the terms of the trust agreement, neither the employer associations, an individual employer, or any local union or any employee shall be liable or responsible for any debts, liabilities, or obligations of CLPT. (C.R. 49, Declaration of Trust, Article 4, para. 31).

No employee of an employer contributing to CLPT can have an expectation of a guaranteed monthly pension benefit. The appropriate collective bargaining agreements contain specific disclaimers including a highlighted and capitalized notice advising all employees that the employer's sole obligation is to make contributions called for in the collective bargaining agreement and pension benefit levels are payable only to the extent that the fund has assets to pay benefits. (C.R. 49, para. 33). That disclaimer also specifically declares "pension benefits are not and have never been guaranteed." *Id.* The primary agreement through which contributions were made to the trust, the 1977 through 1980 Master Labor Agreement, specifically provided that the CLPT was created, negotiated, and was intended to be a defined contribution plan and that individual employer liability was limited exclusively to making the contributions specified in the collective bargaining agreement. (C.R. 49, para. 34).

CLPT trustees have exercised their power to increase benefits through changes in the value of pension credits. *See Ponce v. Construction Laborers Pension Trust,* 628 F.2d 537, 540 (9th Cir. 1980) *(Ponce I)* and *Ponce v. Construction Laborers Pension Trust,* 774 F.2d 1401, 1402 (9th Cir. 1985) *(Ponce II).* In fact, CLPT trustees increased benefits by ten percent in 1980 (without an increase in contributions) thereby increasing the unfunded vested liability by at least ten percent.

B. **Chronology of the Dispute**

Concrete Pipe and Products purchased the assets through which it would manufacture concrete pipe at both the Sacramento and Shafter facilities on December 1, 1976. (C.R. 124, Exhibit 14). Concrete Pipe and Products complied with the former collective bargaining agreement requiring contributions to CLPT initially. In 1978, a new contract with the laborers Union covering employees at the Shafter facility was negotiated. That contract was scheduled to expire by its own terms in May 1981. (C.R. 49, para. 12). Under the terms of the collective bargaining agreement, contributions were to be made measured by hours worked by covered employees in laborers' classifications at the Shafter facility. (C.R. 49, para 13).

On August 17, 1979, Concrete Pipe and Products ceased all production at the Shafter Plant. (C.R. 49, para 14). Petitioner began laying off all of its employees at Shafter and removing the machinery used to manufacture pipe, shipping the machinery to Sacramento for use in the remaining Concrete and Pipe and Products plant. (C.R. 49, para. 16). Employees at Shafter engaged in operations covered by the union contract worked 1,781.75 hours in August 1979, 65 hours in September 1979 and 24 hours in October 1979. (C.R. 49, para. 17). By the end of October 1979, only two full-time employees remained at the Shafter Plant, neither of whom were employed in capacities covered by the collective bargaining agreement, and thus, no contributions were made or required to be made to CLPT on their behalf.[4]

The considerations which led to the closure of the Shafter Plant were purely economic and unrelated to labor cost. Construction in the area where the Shafter Plant was located was declining and demanded types of pipe made from materials other than concrete. (C.R. 124, Joint Exhibit 4, pp. 13-18). Concrete Pipe and Products' nine largest Southern California competitors were located in the more active Riverside/San Bernardino area further south in California. These locations gave competitors a substantial advantage both in terms of reduced transportation costs as well as reduced time of delivery. (C.R. 124, Joint Exhibit 4, p. 100). It was uncontested that Concrete Pipe and Products' executives ordered the plant closure based on these

[4]A handful of hours were reported to CLPT during April 1980 for hours worked when temporary employees were hired to pack and ship the last of the Shafter equipment for transport to Sacramento.

competitive factors and planned to establish new Southern California production operations in the Riverside/San Bernardino area. (C.R. 124, Joint Exhibit 4, pp. 13-14). This change of location would have ended both the Collective Bargaining Duty and the Duty to Contribute because the contract covered only those operations at the precise location of the Shafter Plant. From the fall of 1979 forward, Concrete Pipe and Products made extensive efforts to find a new location in the Bernardino/Riverside area.

Concrete Pipe and Products also attempted to negotiate relief from its lease. The lease required Petitioner to return the land on which the plant was located to the state that had existed prior to the time that a concrete pipe manufacturing plant had been erected on the site. (C.R. 124, Joint Exhibit 4, p. 100). The estimated cost to perform this restoration was approximately $325,000. (C.R. 51). At the same time, the rent was only $12,000 per year. (C.R. 124, Joint Exhibit 4, p. 100). The landlord rejected all proposals to grant relief from this provision of the lease. (C.R. 124, Joint Exhibit 4, pp. 22, 27, 31). Concrete Pipe and Products also had a large inventory of unsold pipe on site as well as an obligation to store a large quantity of pipe previously sold in return for a storage fee of $500 per month. (C.R. 124, Joint Exhibit 4, pp. 73-74, 94). Concrete Pipe and Products therefore determined it was less expensive to pay the rent at Shafter for an empty plant than to abandon the property, move the inventory to an interim site, move it a second time to the contemplated new location, and pay the expenses associated with restoring the Shafter site to its prior condition.

On September 26, 1980, the Multi-Employer Pension Plan Amendments Act (MPPAA) became effective. 29 U.S.C. § 1461(e). The events described above all took place before MPPAA with the exception of the ongoing efforts to try to locate a new facility to replace the closed Shafter Plant. On the date MPPAA was enacted, the Shafter plant had been shut down for more than a year.

The union which formerly represented employees at the Shafter Plant provided notice during April 1981 of an Intention to terminate the collective bargaining agreement and requested negotiations for a successor contract. (C.R. 49, para. 11-12). At that point no manufacturing activity had occurred at the Shafter facility for at least 20 months. (C.R. 49, para. 11-12). Concrete Pipe and Products, consistent with its duty under 29 U.S.C. § 158(d), notified the Union that the existing

union contract was terminated. Concrete Pipe and Products did not refuse to bargain but explained to the union that negotiations would not be worthwhile since the plant was closed, with no intention of reopening it. (C.R. 49, para. 11 and Exhibit "A" in case 82-5184). Negotiations were held and the second session resulted in an impasse in the bargaining between the parties. (C.R. 49, para. 13). At the time the impasse occurred, no concrete pipe had been produced in the Shafter facility for at least 26 months and no contributions, of any kind, had been made to CLPT for more than 19 months, a time period beginning well before the effective date of MPPAA.

Concrete Pipe and Products' efforts to market throughout the state of California continued during the period of time when the Shafter Plant was closed and a new site was being sought. These marketing efforts yielded a contract in Southern California to make a substantial quantity of pipe. The point of delivery was relatively close to the location where the former Shafter facility was located. A decision was made that it would be more efficient to convert the empty Shafter facility into a plant capable of manufacturing concrete pipe than it would be to supply the contract from the existing Sacramento facility several hundred miles to the north. Equipment was therefore removed from the Sacramento facility, shipped down to Shafter, and a concrete manufacturing pipe operation was created on the same site where manufacturing operations had terminated more than two years earlier.

CLPT issued a notice of assessment of withdrawal liability in 1982. CLPT claimed that there had been complete cessation of the obligation to contribute as of January 1, 1982. CLPT has taken the position that the 1979 closure did not constitute a withdrawal from participation in the trust.

C. **Proceedings Below.**

CLPT filed its action, CV 82-5184 MML, in the Central District of California against Concrete Pipe and Products on October 5, 1982, seeking $268,168.81 as withdrawal liability. At the same time, Concrete Pipe and Products filed an action to preclude the assessment in the Eastern District which was transferred and became case number 83-132 and consolidated before Judge Malcolm Lucas in the Central District. The parties conducted discovery, prepared an extensive stipulation of facts (C.R. 49), and cross-motions for summary judgment were filed with each side requesting an adjudication on the merits.

On April 4, 1984, Judge Lucas issued an order *sua sponte*

requiring the parties to arbitrate the issue of whether Concrete Pipe and Products withdrew from the trust prior to the effective date of MPPAA. The parties and the District Court were in agreement that if the withdrawal occurred prior to September 26, 1980, MPPAA did not apply and no withdrawal liability is owed. Judge Lucas refused to resolve the main constitutional issues raised or the jurisdictional question of when the withdrawal occurred. Instead, the court retained jurisdiction over the consolidated actions pending an attack on the arbitrator's award. (C.R. 68). Concrete Pipe and Products appealed and the Ninth Circuit dismissed the appeal on November 21, 1985 because the order was not ripe for appeal. *Construction Laborers Pension Trust v. Cen-Vi-Ro Concrete Pipe and Products, Inc.*, 776 F.2d 1416 (9th Cir. 1985). The case was then remanded to the District Court, which in turn referred the matter to arbitration.

Arbitration was conducted pursuant to 29 U.S.C. § 1401 during 1987 and 1988. The 1987 hearing concerned the jurisdictional issue of whether Concrete Pipe and Products withdrew before the effective date of MPPAA. On this phase of the case, the arbitrator applied the 29 U.S.C. § 1401 presumptions, and ruled against Concrete Pipe and Products. The 1988 hearing concerned the validity of the withdrawal liability computation. Concrete Pipe and Products prevailed, in part, on this phase and the withdrawal liability was reduced from $268,168.81 to $190,465.57.

Concrete Pipe and Products then filed the third action (Central District Case No. 88-5759) as an action to set aside or modify the arbitrator's decision pursuant to 29 U.S.C. § 1451. The 1988 action was consolidated with the two prior actions. The parties again filed cross motions regarding enforcement of the arbitrator's award. The court issued its final order and judgment on July 5, 1989 (C.R. 127). The court treated Concrete Pipe and Products' motion for summary judgment as a petition to vacate the arbitrator's award and denied relief. The court then granted CLPT's motion to confirm the arbitration award, but denied the portion of the petition which sought to restore the amount of the award reduced by the arbitrator. Concrete Pipe and Products appealed and that appeal was denied as was the request for rehearing and rehearing *en banc*. This petition followed.

V
ARGUMENT

At the core of this dispute is CLPT's contention that the 1979 complete cessation of operations was not a pre-MPPAA withdrawal under 29 U.S.C. § 1383. A combination of erroneous jurisdiction rulings by the District Court and the presumptions contained in the MPPAA dispute resolution provisions, 29 U.S.C. § 1401, permitted CLPT to make a withdrawal liability assessment. The result is that an employer who cannot be rationally charged with an obligation for the unfunded benefits of this plan is being retroactively deprived of property without due process.

A. Rule 10 Considerations.

This dispute permits the Court to focus on a number of troubling MPPAA issues which have national impact and are directly in controversy in this case. Some of these issues have split the Circuit Courts of Appeal. Other issues deal with the constitutionality of various MPPAA provisions as applied; questions reserved by this court when it determined the facial validity of the statute in *Connolly v. Pension Benefit Guarantee Corporation,* 475 U.S. 211 (1986). One of the issues covered by this petition was most recently before the court based upon a Third Circuit decision that portions of the Act were unconstitutional and an equally divided panel of this court affirmed. *PBGC v. Yahn & McDonnell, Inc.,* 481 U.S. 735 (1987).

Apart from the disagreement between the Circuits on some of these issues, the withdrawal liability scheme and the procedural mechanisms involved in it are matters of economic life and death to many employers. The uncertainty surrounding these issues tends to deter employers from entering multi-employer plans, an outcome directly contrary to the intention of Congress in enacting MPPAA. There is also little doubt that MPPAA's harshest consequences tend to fall on relatively small employers like petitioner who lack the tenacity and resources to permit this court to review the statute as it is applied.

B. The Court Exceeded Its Jurisdiction By Compelling Arbitration Over The Question Of Statutory Interpretation Which Determined Whether Jurisdiction Existed.

Federal courts are intrinsically courts of limited jurisdiction and the limits on this jurisdiction can neither be disregarded nor evaded. *Owen Equipment & Erection Company v. Kroger,* 437 U.S. 365, 374

(1978). It is because of this limitation on jurisdiction that a threshhold issue is whether the court had the jurisdiction to take action. This bedrock principle that federal courts have no power to proceed absent an express finding that federal jurisdiction exists has been the rule of law for more than a century. *E.g., Ex Parte McCardle,* 74 U.S. (7 Wall) 506, 514 (1868). Since the days of *Ex Parte McCardle, supra,* it has not been sufficient for a court to assume or presume it has jurisdiction. Rather, the court must *find* that it has jurisdiction or it must conclude it has no power to proceed.

The district court's 1984 order compelling the parties, *sua sponte,* to arbitrate this dispute violated this basic principle. The basis for the court's arbitration order was 29 U.S.C. §.1401(a) (1) which states, in part:

> Any dispute between an employer and the plan sponsor of a multi-employer plan concerning a determination made under §§ 1381 through 1399 of this title shall be resolved through arbitration.

The core dispute between the parties here was whether the withdrawal from CLPT occurred in 1979, before the Act became effective, or in January 1982, after MPPAA became effective. Thus, the determination of the date on which the withdrawal occurred must be answered before the court can conclude that the dispute is governed by the provisions of MPPAA.

This court has held that arbitrability is "undeniably an issue for judicial determination." *AT&T Technologies, Inc. v. Communications Workers of America,* 475 U.S. 643, 649 (1986); *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 547 (1964). This court has also reaffirmed that a court may not refer the issue which determines whether the arbitrator has jurisdiction to the arbitrator for resolution. Instead, this is a question that must be resolved by the Court in the first instance. *See, AT&T Technologies v. Communications Workers,* 475 U.S. 643, 655-657 (1986). The underlying premise of this line of the Court's decisions is that one must first determine whether the parties intended the issue in question to be arbitrated before compelling an arbitration process. The existence of this obligation through contract is a threshold determination governing whether the court has the power to compel the arbitration to occur.

The court below found that the line of cases requiring a court to

determine arbitrability was inapplicable if the source of the duty to arbitrate arose from a statute rather than an agreement. In so doing it relied on *Teamsters Pension Trust Fund Board of Trustees of the Western Conference v. Allyn Transportation Co.*, 832 F.2d 502, 505 (9th Cir. 1987) (*Allyn*). The Third Circuit has also compelled the parties to arbitrate the question of whether the employer withdrew before the effective date of MPPAA or afterwards. *See, Warner-Lambert Co., Inc. v. United Retail and Wholesale Employees Teamsters Local No. 115 Pension Plan,* 791 F.2d 283, 287-88 (3rd Cir. 1986). (*Warner-Lambert*).

The rationale for the rule compelling a party to arbitrate the arbitrability issue in statute cases but prohibiting a similar order in contract cases is based on the prototypical distinction without a difference. In *Allyn,* the Ninth Circuit distinguished the *AT&T Technologies* line of cases as follows:

> In this case, the duty to arbitrate arose not from an agreement of the parties, but from the statute. The matters to be resolved by arbitration are not to be determined by the party's intention, but by the intention of Congress. As we have seen, the statute states unambiguously that, "(A)ny dispute between an employer and the plan sponsor . . . concerning a determination made under §§ 1381 through 1399 . . . shall be resolved through arbitration." 29 U.S.C. 1401(a) (1), and Congress clearly intended exactly what those words import.

832 F.2d at 505-506. If the arbitrator is allowed to make this decision, he or she is determining the existence of the court's jurisdiction to order arbitration. Petitioner knows of no other area of private sector labor relations under which this court has embraced the notion that arbitrators have the intrinsic power to determine their own jurisdiction. Likewise, Petitioner is unaware of another scheme which permits a non-Article III decision maker to rule dispositively on whether a federal court has jurisdiction.

Among the problems with the *Allyn* rule is that it endorses a rule of law permitting an arbitrator to force parties to accept his decision on arbitrability when he is determining Congressional intent, but not when interpreting a contract. Either way, arbitrability as the Supreme Court noted, "is undeniably an issue for judicial determination." *AT&T*

Technologies v. Communications Worker's, 475 U.S. 643 at 649. There is no support in the *AT&T Technologies* line of cases for the *Allyn* distinction. As importantly, there is no intuitive reason for the underlying rule of law that arbitrators are more clearly capable of divining Congressional intent than they are the intent of two contracting parties.

It should also be noted that the Ninth Circuit does not require arbitration of constitutionality issues. *Allyn,* 832 F.2d at 506. Thus, under *Allyn,* courts must resolve contract arbitrarily and constitutional questions but the arbitrator can resolve the statutory jurisdictional issue. The interpretation of Congressional intent more nearly resembles an examination of the Founding Father's intent than it does that of contracting parties. It is difficult to see the difference between compelling parties to accept an arbitrator's determination under Art. III of the Constitution, but not of Amendment V.

This question of how arbitrability is determined is a matter of great importance which this Court has not but should address. First, the answer determines whether an impartial federal judge *decides* the issue or an arbitrator *presumes* under the Act that the employer is covered by the Act. Second, the requirement that the parties request arbitration very early in the withdrawal liability process leads to multiple track litigation. If the employer sues to have the court determine arbitrability, but does not request arbitration, he or she may be found to have waived most rights pursuant to 29 U.S.C. § 1401(b). Conversely, if the employer pursues arbitration but does not initiate the federal action to contest jurisdiction, it could be argued that the employer has voluntarily submitted to the arbitrator's jurisdiction. This conundrum leaves employers with little choice but to file the federal action *and* request the arbitration. This parallel approach results in the kind of elongated proceedings reflected by this record.

If the court agrees that its *AT&T Technologies* line of cases applies equally to statutory and contract arbitration provisions, this case presents an opportunity to make that point clear. Regardless of the outcome on the merits, a determination on this issue will eliminate substantial uncertainty and duplicative proceedings and should result in a significant conservation of resources by parties and the courts below.

C. **The 29 U.S.C. § 1401 Presumptions Violate the Due Process Rights of Withdrawing Employers by Denying Them Access to an Impartial Decisionmaker.**

The constitutionality of the dispute resolution mechanisms under MPPAA have been in controversy from the inception of the legislation. In summary, once the dispute resolution process begins, all determinations made by the plan are presumed by the arbitrator to be correct unless the party contesting the determination can prove by a preponderance of the evidence that the determination was unreasonable or clearly erroneous. 29 U.S.C. § 1401(a)(3). Following the arbitration, the district court may review the arbitrator's decision. 29 U.S.C. § 1451. However, the district court must presume that the arbitrator is correct in deferring to the Plan's decisionmaking process unless the employer can prove by a clear preponderance of the evidence that the findings of fact made by the arbitrator were wrong. 29 U.S.C. § 1401(c). Most employers with a choice between this process and taking their chances with Lewis Carroll's Queen of Hearts would choose the latter.

This precise issue was before the Court during its October 1986 term but did not result in a precedential resolution of the question. The court granted *certiorari* to review a Third Circuit decision, *United Retail and Wholesale Employees, Teamsters Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*,787 F.2d 128 (1986), (*Yahn & McDonnell*) which declared the presumptions to be an unconstitutional denial of due process. This court was equally divided by the issue, resulting in affirmance of that particular case. *PBGC v. Yahn & McDonnell,* 481 U.S. 735 (1987).

As the District Court in this case noted, that affirmance by this Court was not sufficient to develop precedent overturning the other Court of Appeals' decisions finding this provision of the Act constitutional. C.R. 127, p. 2-3. Thus, notwithstanding this Court's action in the *Yahn & McDonnell* case, the split in the Circuits continues. The Ninth Circuit has continued to find the presumptions constitutional and ruled against petitioner on this issue below.

The status of the law subsequent to this Court's 1987 decision continues to be accurately reflected by the Third Circuit's decision in *Yahn & McDonnell* and the divided *en banc* decision by the First Circuit in *Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund,* 762 F.2d 1137 (1st Cir. 1985). Thus,

neither the conflict between the Circuits nor the importance of this issue has diminished since this Court granted *certiorari* in *Yahn & McDonnell* during the 1986 term.

As a general proposition, this Court has concluded that an impartial decisionmaker is an inherent characteristic of due process. *E.g., Ward v. Village of Monroeville,* 409 U.S. 57 (1972). Among the evils resulting from the compounding presumptions of pension plan infallibility is that the presumptions become effectively irrebuttable. This Court has also noted on numerous occasions that irrebuttable presumptions violate due process. *E.g. Valandis v. Kline,* 412 U.S. 441, 453 (1973). As importantly, the court has noted that whether a presumption is rebuttable or irrebuttable, must be determined by its effect rather than its label. *Id.* at 453. Under this definition, the actuarial assumptions and methods used by the Plan to value its unfunded vested benefits, and therefore its withdrawal liability, are incapable of being rebutted in the absence of an unlikely soul-cleansing confession by the Plan's actuary.

One of the practical problems is that each of the factors which goes into the withdrawal liability calculation is the result of a process akin to an educated guess. The actuary sets assumptions for the Plan, but there is no objective yardstick to measure the fairness of the assumption. The statute contemplates issuance of regulations by the Pension Benefit Guaranty Corporation establishing reasonable actuarial assumptions and methods. 29 U.S.C. § 1393(a). A decade later, PBGC has not issued these regulations providing an objective measure of actuarial assumptions. As a consequence, in this case, as with most withdrawal liability cases, the Plan's actuary testifies that the assumptions he used were in the range which he determines to be reasonable. That "range of reasonableness" is frequently broad enough to be the difference between a plan with significant unfunded liability and one which may be teetering on the brink of overfunding. *See, Keith Fulton & Sons v. New England Teamsters and Trucking Industry Pension Fund, Inc.,* 762 F.2d 1137 (1st Cir. 1985) (*en banc*) (Aldrich dissenting). (The interest rate assumption range of reasonableness was between 7.5% and 14.5%). Although the employer can present the views of another actuary, as in this case, the outcome of the conflict in testimony cannot overcome the burden imposed by the presumption.

Thus, as applied to calculation of the withdrawal liability, the

so-called rebuttable presumptions are, in fact, irrebuttable in the absence of a confession by the trust fund's actuary that his own analysis was unreasonable. At least one court has applied the *Valandis v. Kline, supra,* reasoning and concluded that presumptions of this sort are irrebuttable presumptions and an unconstitutional denial of due process. *See, Universal Restoration, Inc. v. United States,* 798 F.2d 1400, 1406 (Fed. Cir. 1986). Although *Universal Restoration* arises in a different context under a different statute, the burdens imposed under that statute are quite similar to those imposed upon withdrawing employers under this statute.

Another sub-issue worthy of this Court's attention is the solution if the Court agrees that the presumptions represent an unconstitutional denial of due process. In *Yahn & McDonnell,* the Third Circuit advocated treating the 29 U.S.C. § 1401(a)(3) presumptions as severable. Petitioner suggests that an equally reasonable approach would be to jettison both the 29 U.S.C. § 1401 (a) (3) presumption and the 29 U.S.C. § 1401 (c) presumption. Other solutions are also viable, but it is important that this issue also be resolved.

D. **Making a Determination on Whether a Complete Cessation of Operations was Permanent Based on Events Occuring Two Years After a Complete Cessation of Operations is Unfair And Unduly Disruptive of the Party's Expectations and Interstate Commerce.**

The primary focal point of the date of withdrawal issue is whether the 1979 cessation of all covered operations constituted "permanent cessation of covered operations" within the meaning of 29 U.S.C. § 1383. There is no factual dispute about what transpired from August 1979 through the withdrawal assessment in early 1982. There is a fundamental dispute over the impact, if any, of the events during 1981 on this determination. Consistent with Supreme Court Rule 10(c), the circumstances under which a withdrawal by complete cessation of operations occurs has not been resolved by this Court. It should be resolved at this time so that uncertainty on this issue does not unduly interfere with participation in multi-employer plans or decisions by employers like Concrete Pipe and Products to open new facilities.

The parties have been able to crystalize their respective approaches to this issue. Concrete Pipe and Products contends that the appropriate measure is one which examines the objective circumstances in place at

the time that the complete cessation of operations occurs. CLPT urges an approach through which the trustees apply a hindsight analysis under which they can ignore a cessation of covered operations for an indefinite period of time and make a determination on withdrawal at a time of its choosing, presumably maximizing the amount of withdrawal liability it can charge to the withdrawing employer.

Petitioner urges that the Ninth Circuit was wrong in endorsing CLPT's approach. First, the legislative history supports the fact that the entire purpose of MPPAA was to rapidly accelerate the point in time at which the unfunded vested liability can be charged against a withdrawing employer. As this Court noted in its extensive analysis of legislative history of MPPAA in *Nachman Corp. v. PBGC,* 446 U.S. 359, 361-362 (1980), and *PBGC v. R.A. Grey & Company,* 467 U.S. 717, 720 (1984), the purpose of MPPAA was to accelerate the assessment and collection of withdrawal liability. Second, the statutory scheme contains provisions for dealing with faked closings or fraudulent transactions to evade the assessment of withdrawal liability, 29 U.S.C. § 1369. Third the statute also contains provisions for accommodating and reducing withdrawal liability for those employers who suffer a complete withdrawal, but subsequently re-enter the plan. *See,* 29 U.S.C. § 1387. Indeed, PBGC's regulations contemplate that there can be a withdrawal by complete and permanent cessation of covered operations followed by a re-entry into the plan on more than two occasions in a 5½ year period. 29 C.F.R. § 2647.8(c).[5] Nothing in the statute or regulations supports the "wait and presume" approach used here.

This issue is one of true national importance, because of the impact on future decisionmaking by employers. It is relatively clear, here, that had Concrete Pipe and Products been able to foresee the withdrawal liability oddessy which lay ahead, it would either have added several hundred thousand dollars to its 1981 bid price to cover the withdrawal liability, manufactured the pipe in Sacramento and absorbed the transport costs, or simply not bid the job. All three of these consequences have a negative impact on interstate commerce. CLPT's theory for assessing withdrawal liability also provides a significant deterrent to those employers who may be contemplating the establish-

[5] This conclusion is drawn from the date on which the statute became effective (September 26, 1980), the nature of the regulation dealing with employers who withdraw and re-enter two or more times, and the promulgation of that regulation in March 1986, 51 Fed. Reg. 10300.

ment of operations at facilities which they had closed in the past.

In this case, CLPT reached out more than two years to conclude that a 1979 complete cessation of operations was, on 20-200 hindsight, not permanent. The message to employers is that the risk will inevitably exceed the benefits of attempting to establish operations in a community or site abandoned in the past. This outcome does nothing to increase participation in multi-employer plans, provide jobs, or facilitate the free flow of interstate commerce. The issues presented by the Ninth Circuit's affirmation of CLPT's hindsight approach to assessing withdrawal liability are substantial and present questions of national importance requiring resolution by this Court.

E. MPPAA Violates the Fifth Amendment Rights of Employers like Concrete Pipe and Products Where There is no Rational Connection Between the Expectation of the Parties and the Resulting Withdrawal Liability and None of the Unfunded Vested Liability in the Plan Can be Attributed to the Withdrawing Employer.

In *Connolly v. PBGC,* 475 U.S. 211 (1986), the Court's analysis dealt only with the facial challenge as emphasized by the concurring opinion of Justices O'Connor and Powell. That concurring opinion noted:

> Specifically, the court does not decide today and has left open in previous cases, whether the imposition of withdrawal liability under the MPPAA and of plan termination liability under the Employee Retirement Income Security Act of 1974 (ERISA) may in some circumstances be so arbitrary and irrational as to violate the due process clause of the Fifth Amendment. [cites omitted] The court also has no occasion to decide whether the MPPAA may violate the taking clause as applied in particular cases . . .

475 U.S. at 228. Justices O'Connor and Powell then describe a number of situations in which the constitutionality of the statute, as applied to particular employers, may violate due process. Petitioner suggests that the facts of this case provide an excellent opportunity to determine these issues regarding the constitutionality of the statute as applied to small withdrawing employers.

Concrete Pipe and Products was assessed withdrawal liability even though none of the unfunded vested liability of CLPT could be

attributable to Concrete Pipe and Products' employees. There is no dispute that CLPT's vesting schedule required at least ten years of service before benefits became vested. C.R. 124, Exhibit Jt. Ex. 7-E (Actuarial Valuation Certificate Ex. III). Concrete Pipe and Products' contributions to the plan began no earlier than December 1976, and ended for all practical purposes in October 1979, a period of less than three years.

The key factor in each of the different methods of computing withdrawal liability in 29 U.S.C. § 1391 is that it results in an allocation of the unfunded *vested* benefits of the Plan. It is unmistakable that CLPT's unfunded vested liability is attributable to employees of employers other than Concrete Pipe and Products because none of petitioner's employees had enough covered service to become vested in the Plan. As importantly, CLPT unilaterally increased the unfunded liability by ten percent in 1980 when it granted a ten percent benefit increase without an increase in contributions. Determining withdrawal liability based on the contribution ratio facts in this case is both arbitrary and irrational as applied.

As noted above, the Plan documents and the collective bargaining agreements all note that benefits are not guaranteed and that the employer's liability is strictly limited to the contribution amount contained in the collective bargaining agreement. It is also undisputed that Concrete Pipe and Products never played any role in the management of CLPT.

Concrete Pipe and Products submits that a withdrawal liability assessment in this case presents precisely the kind of violations of the taking and due process clauses about which the concurrence in *Connolly* was concerned. The undisputed evidence contradicts the possibility that a promise of definite benefits was made to any employees of Concrete Pipe and Products or any participant in CLPT. The evidence also directly contradicts any assertion that Petitioner agreed to guarantee the vested benefits provided to other employers' employees who participated in this Plan.

The computation of the withdrawal liability under 29 U.S.C. § 1391 retroactively, arbitrarily and irrationally takes property from Petitioner and denies Concrete Pipe and Products due process. There is nothing in Concrete Pipe and Products' conduct on this record which justifies the imposition of this kind of liability, particularly since none of

the unfunded vested liability can be attributable to Concrete Pipe and Products' employees.

The concerns expressed in the *Connolly* concurring opinion regarding the constitutionality of MPPAA as applied are amply demonstrated in this case. Justices O'Connor and Powell expressed concern that the imposition of retroactive liability on an employer for the benefit of other employers' employees could be arbitrary and irrational thereby violating the takings clause of the Fifth Amendment. Here, CLPT seeks to impose more than $190,000 in withdrawal liability against Petitioner even though this exceeds Petitioner's contribution and none of that liability is attributable to vested benefits owed to employees of Concrete Pipe and Products. The record is devoid of (1) guarantees by Petitioner to pay for the old debts of CLPT or (2) guarantees by either Concrete Pipe and Products or CLPT to the employees covered by the Plan that a certain level of benefits would be provided.

The *Connolly* concurrence also expressed concern that imposition of liability without regard to the extent of the employer's actual responsibility for the Plan promises (and whether those promises were conditional) might also violate the Fifth Amendment. This concern expressed in the abstract is precisely what occurred, in fact, in this case.

The Court is unlikely to be presented with a more clear fact pattern for determining whether assessment of withdrawal liability against an employer with no vested employees in the Plan is constitutional as applied. This issue is of significant national interest because the imposition of withdrawal liability on small businesses or newer businesses is a significant deterrent to entry into multi-employer plans, and particularly to those with significant amounts of unfunded liability.

Saddling small single employers who had no impact on the massive underfunding of this Plan with a withdrawal liability which far exceeds its total contributions is an arbitrary, irrational and unjust way to address the pension underfunding issue. Moreover, where this assessment cannot be rationally or logically traced to any conduct by the employer in either creating the underfunded nature of the Plan or in guaranteeing the benefits, the kind of due process concerns raised in the concurring opinion in *Connolly* become very real. Indeed, the concurring opinion has proved prophetic in that each of the concerns expressed about the harshness of outcomes in individual cases is presented in this dispute.

VI
STATEMENT PURSUANT TO SUPREME COURT RULE 29.4(b)

The constitutionality of MPPAA is drawn into question in this proceeding and neither the United States nor any department, office, agency, officer, or employee thereof is a party. Accordingly, 28 U.S.C. § 2403(a) may be applicable and this document is concurrently being served on the Solicitor General. Petitioner cannot verify that the Ninth Circuit provided notice below. Counsel for Petitioner was contacted by an attorney for PBGC during prior proceedings but has no knowledge of whether that agency notified the Solicitor General.

VII
CONCLUSION

Concrete Pipe and Products urges the Court to grant its Petition for Writ of Certiorari to resolve these unsettled questions involving multi-employer withdrawal liability under MPPAA.

DATED: November _____, 1991.

DIEPENBROCK, WULFF, PLANT
& HANNEGAN

By _____
JAMES M. NELSON
Attorneys for PETITIONER
CONCRETE PIPE AND PRODUCTS
OF
CALIFORNIA, INC.

APPENDIX

(a) Opinion by Court Whose Decision is Sought to be reviewed

(b) Other Opinions, Orders and Findings of Fact
- District Court Order, July 5, 1989
- Arbitration Decision I, August 26, 1987
- Arbitration Decision II, August 16, 1988
- District Court Order, March 19, 1984

(c) Order on Request for Rehearing

(d) Constitutional Provisions, Statutes, Regulations Involved in the Case

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BOARD OF TRUSTEES OF THE CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA, Plaintiff-Appellee, v. CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC., Defendant-Appellant.	No. 89-55854 D.C. No. CV-82-5184-HLH **MEMORANDUM***

Appeal from the United States District Court
for the Central District of California
Harry L. Hupp, District Judge, Presiding
Argued and Submitted May 6, 1991
Pasadena, California

Before: HUG, NORRIS, and LEAVY, Circuit Judges

We affirm the district court's decision. Whether Concrete Pipe and Products of California ("Concrete Pipe") withdrew from the employee benefits plan before the Multi-Employer Pension Plan Amendments Act Of 1980 ("MPPAA") was properly sent to arbitration. *See Teamsters Pension Trust Fund Bd. of Trustees of Western Conf. v. Allyn Transp. Co.*, 832 F.2d 502, 505 (9th Cir. 1987).

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

We affirm the arbitrator's calculation of withdrawal liability for the reasons stated by the district court.

Concrete Pipe's constitutional challenges to the MPPAA are controlled by *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224 (1986) and *Board of Trustees v. Thompson Bldg. Materials, Inc.*, 749 F.2d 1396, 1400 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985).

Appellees are entitled to attorney's fees on appeal pursuant to 29 U.S.C. § 1132(g)(2)(D). *See Lads Trucking Co. v. Bd. of Trustees of Western Conf. of Teamsters Pension Trust Fund*, 777 F.2d 1371, 1375-76 (9th Cir. 1985).

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA Plaintiff v. CEN-VI-RO CONCRETE PIPE AND PRODUCTS Defendant	)	CV 82-5184 HLH CV 88-5759 HLH ORDER RE CROSS MOTIONS TO VACATE/ MODIFY/CONFIRM ARBITRATION AWARD

The motion of Concrete Pipe and Products Company of California, Inc. (hereinafter CPP), is treated as a petition to vacate the arbitration award, and is denied. The motion of Construction Laborers Pension Trust (hereinafter CLPT) to confirm the arbitration award is granted. To the extent that the motion to confirm the award seeks to "modify" the award, such is treated as a motion to vacate and is denied. The judgment is to be entered confirming said award, plus interest from the filing of case CV 82-5184, plus attorney's fees for the court litigation (but not the arbitration proceeding). CLPT is to submit the form of judgment.

This order will serve as the findings of fact and conclusions of law unless either party wishes more formal findings and conclusions, in which case, same shall be drafted by CLPT. Attorney's fees shall be claimed on the cost bill, with a supplementary declaration or declarations setting for the basis of the fees claimed. The Court adopts as its findings and conclusions the opinions of the arbitrator except as specifically set forth, and makes certain additional findings and conclusions herein.

1. PRIOR PROCEEDINGS IN THIS COURT

The Court adopts the legal conclusions of Judge Lucas in his determinations of 4/4/84. It is noted that the Ninth Circuit declined to consider an appeal as to those conclusions. With the rendering of final

judgment herein, those conclusions may now be reviewed (except, perhaps, as they have become moot).

2. CONSTITUTIONALITY OF MPPAA

The Court will not declare any of the provisions of MPPAA unconstitutional. While a district court can presumably reach a conclusion that a statute is unconstitutional in whole or in part, such is normally done by appellate courts who are charged with the necessary constitutional wisdom by virtue of their institutional position in the judicial hierarchy.

Furthermore, the Ninth Circuit has held constitutional many of the provisions of MPPAA which CPP challenges, with the implication being that the rest is also constitutional. *See Board of Trustees v. Thompson Building Materials,* 749 F.2d 1396 (9th Cir. 1984). Only one aspect of the Act has been declared unconstitutional. *See United Retail and Wholesale Employees v. Yahn & McDonnell, Inc.,* 787 F.2d 128 (3rd Cir. 1986), aff'd by divided court, 481 U.S. 735 (1987). While the affirmance got three votes in the Supreme Court, it did not get five and is thus not binding here.

The Ninth Circuit's decision in *Thompson* is, however, binding on this court (and on any three judge panel of the Ninth Circuit), and the Court will follow it. CPP argues that the facts of this case are distinguishable from those in *Thompson* on the grounds that the Ninth Circuit decision was premised on a factual conclusion that the trustees did not have a conflict of interest, while the trustees in the case at hand do. The Court rejects this line of reasoning. It does not read the *Thompson* as being limited to the specific facts of that case. To the extent that the arguments that the Trustees of CLPT have a conflict in making presumptively valid determinations has constitutional merit, such arguments should be presented to the Court of Appeals, presumably *en banc.*

3. WITHDRAWAL LIABILITY

The primary dispute between that parties is the date of withdrawal from the plan. Under MPPAA, an employer may be liable for complete withdrawal liability where it either: 1) permanently ceases to have an obligation to contribute under the plan; or 2) permanently ceases all covered operations under the plan. *See* 229 U.S.C. § 1383(a). The arbitrator concluded that the closing of the Shafter plant in late 1979-early 1980 (prior to the date of MPPAA effectiveness) was merely

temporary, as shown, *inter alia*, by the reopening of the plant in 1981, causing withdrawal liability to be created as of the date that CPP's obligation under its collective bargaining agreement ended.

A. Standard of Review

As noted above, the Court will not second guess Judge Lucas' determination that the date of complete withdrawal is a question to be decided in the first instance by the arbitrator. The factual finding of the arbitrator regarding the date of withdrawal from the plan is to be upheld unless it is against the "clear preponderance" of the evidence. *See* 29 U.S.C. § 1404(c). Presumably this means more than a mere preponderance and something less than a "clearly erroneous" standard.

CPP argues that a *de novo* standard of review is appropriate for all of the conclusions reached by the arbitrator with respect to the issue of liability. However, the Court believes that the more deferential standard of § 1404(c) must be applied to the findings of fact, including the factual inferences drawn from the facts by the arbitrator.

B. Permanence of Closing of Shafter Facility

The factual findings of the arbitrator regarding the date of withdrawal from the plan are not contradicted by a clear preponderance of the evidence. In challenging the findings of the arbitrator, CPP makes several assumptions which the court does not accept. CPP assumes that whether a business permanently ceases "all covered operations" under the plan is dependent only (or primarily) on its subjective intent when it closes a plant. It also assumes that only its intent with regard to the operation of a particular plant is to be considered. And, it further assumes that subsequent events may not be looked at in determining whether all covered operations have ceased. The Court agrees with none of these assumptions.

As to the intent at the closing of the plant, the Court does agree with CPP that such is not wholly irrelevant and is one fact to consider among many facts, but does not agree that such intent at a particular time is factually or legally determinative of the issue to the exclusion of other facts.

Here the evidence is consistent with the conclusion drawn by the arbitrator that CPP did not intend to permanently cease operations at the Shafter plant, but that CPP merely closed what was apparently at the time an uneconomical operation. When the plant again became economical, it was reopened for a period, thus demonstrating that the

closing was conditional. As powerfully set out by the arbitrator, CPP's retention of the site, the sending of salesmen into the area, and the negotiation and conclusion of a contract for which the plant was later reopened, all negate an intent to abandon permanently the covered operations at the Shafter plant. Thus, the arbitrator had sufficient basis to conclude that the date of cessation of the obligation to pay benefits (which was after the effective date of MPPAA) was the date of complete withdrawal.

CPP argues that the facts on which the arbitrator relied have other explanations. For example, CPP claims that the reason it continued to renew leases on the property was solely to avoid having to clear the site as required by its lease. The Court notes that this explanation is not wholly convincing, since renewal of the lease would only postpone the inevitable cost of clearance, assuming permanent cessation. More importantly, the conclusions of and the inferences drawn by the arbitrator are reasonable and support the decision, which is not contrary to the clear preponderance of the evidence, or indeed, contrary to a mere preponderance.

The fact that the plant was reopened when a favorable economic opportunity arose is itself strong evidence that it was not permanently closed, but only closed during the pendency of a particular economic condition. The Court will not interfere with the factual determination of the arbitrator.

CPP argues that the arbitrator's decision "does violence" to the statutory scheme of MPPAA. It points to 29 U.S.C. § 1387 (which allows waiver or reduction of liability where a withdrawing employer later reenters a plan). CPP concludes that this section proves that an employer may withdraw from a plan multiple times, and thus, that withdrawal must be determined on the date the plant was closed without reference to subsequent events. The Court rejects this line of reasoning. Section 1387 is designed to deal with a different problem: where liability is assessed, but the withdrawal turns out not to have been permanent. That situation is not presented by the facts at hand. In fact Section 1387 could be interpreted in a manner exactly contrary to CPP's analysis. That section may indicate that only withdrawals which turn out based on subsequent developments to have been permanent establish full liability under MPPAA.

Finally, the Court rejects the claim that its decision will result in

violation of the purposes of MPPAA. CPP asserts that acceptance of the "mothballing" theory will result in plans being strung along by an employer with claims that a cessation of covered activity is merely temporary. However, as noted above, the terms of MPPAA deal with the problem of withdrawals that appear permanent but later prove to have been temporary. *See* 29 U.S.C. § 1387. The obvious solution is to assess liability against such an employer and allow it to later move under Section 1387 for a recovery.

4. AMOUNT OF WITHDRAWAL LIABILITY

Both sides challenge the arbitration award as to the amount of liability. The CLPT asserts that the arbitrator erred in not including the contribution history of CEN-VI-RO (the prior owner of the facility in question, which sold the plant to CPP in 1976). CPP, on the other hand, claims that the actuarial assumptions used by the plan are unreasonable, that the sum assessed includes liabilities which were the result of a breach of fiduciary duty by CLPT, and that the trust ignored its actuary's policy with respect to discount rates where an employer pays in a lump sum.

A. CLPT's Claims

The Court rejects the trust's challenges to the amount of withdrawal liability. The Court agrees with the arbitrator that MPPAA does not mandate the consideration of the prior contribution history of CEN-VI-RO. *See* Arbitration Award of August 16, 1988 at pp. 10-17. 29 U.S.C. § 1384(b) is limited to situations where liability is escaped by a seller of covered assets under § 1384(a). Likewise, the doctrine of successor liability is inapplicable, since there was no notice that CPP would acquire MPPAA liability (the Act had not even been passed on the date of the acquisition).

B. CPP's Claims

The Court also rejects the challenges of CPP to the amount of liability. CPP earnestly insists that it is unconstitutionally unfair for an interested party to make a determination which binds its adversary and to have that determination given presumptive effect by the courts or arbitrators. However, the statute so provides, and, as set forth above, this has been approved by the Ninth Circuit. Thus, CPP has the burden of showing that the actuarial assumptions were "in the aggregate unreasonable" or that the "plan's actuary made a significant error in

applying the actuarial assumptions or methods. *See* 29 U.S.C. § 1401(a)(3).

The plan's actuary had the significant fortifying feature of being the most widely recognized in the field, with massive experience nationwide in advising pension trustees. CPP attacked the assumptions with an actuary of vastly less experience (in fact no experience with multi-employer trusts). While the use of any economic prediction factor can be debatable, the Court cannot say, or come close to saying, that the conclusions of the arbitrator are against the clear preponderance of evidence. The Court accepts the reasoning of the arbitrator in this respect and adopts his findings.

The Court also rejects the claim raised by CPP that the calculated liability includes amounts that are the result of violations of fiduciary duty by the trustees. CPP has no standing to complain about a trust policy that extended the amount of time necessary for vesting (to 15 years) and increased the pensions of already vested employees (by 10%). *See Ponce v. Construction Laborers Pension Trust of Southern California,* 774 F.2d 1401 (9th Cir. 1985). Furthermore, the *Ponce* case did not hold that the *increase* in the pensions was a breach of duty, but that the overly long vesting period was. Thus, the holding provides no support for CPP.

Finally, the Court does not accept the claim that the trust violated its own actuary's policy of calculating withdrawal liability at a higher discount rate where an employer is willing to pay in a lump sum. That policy is designed to lower liability where the trust is not required to accept interest rate and other economic risk because an employer pays its withdrawal liability completely up-front. CPP has not done so. In fact, to this day, it has not paid its liability and professes that it intends to delay so doing until it has a chance to appeal to the Circuit Court.

5. ATTORNEY'S FEES AND COSTS

CLPT is entitled to its fees and costs for the court work. *See Lads Trucking Co. v. Board of Trustee,* 77 F.2d 1371 (9th Cir. 1985)(trust entitled to fees in "action" under ERISA). However, MPPAA appears to leave the questions of attorney's fees incurred in an arbitration proceeding to the discretion of the arbitrator. *See* 29 U.S.C. § 1401(a)(2) (arbitrator may award reasonable attorney's fees). In this case, the arbitrator decided that each side should bear its own attorney's fees. Hence, CLPT may not recover those amounts with respect to the arbitration proceeding.

IT IS SO ORDERED.
DATED 7/3/89

HARRY L. HUPP
United States District Judge

American Arbitration Association

In the matter of Arbitration)
)
Between)
)
CONSTRUCTION LABORERS)
PENSION TRUST FOR)
SOUTHERN CALIFORNIA)
)
and)
)
CONCRETE PIPE AND)
PRODUCTS COMPANY, INC.)
_____)

DECISION OF ARBITRATOR

Kenneth M. Schwartz
Arbitrator
141 South Linden Drive
Suite 203
Beverly Hills, CA 90212
Telephone: (213) 274-9734

I

The Proceedings

This arbitration hearing is being conducted pursuant to an order of the United States District Court for the Central District of California wherein Judge Malcolm Lucas ordered the parties to arbitrate the dispute existing between them. The issues in this matter have been bifurcated with the threshold question to be decided of whether the Company has a withdrawal liability in the first instance. It was understood and agreed that should it be determined that the Company has incurred a withdrawal liability, then and in that event, the Company could, if it cared to do, so challenge the calculation of the amount of the liability in a subsequent hearing.

Counsel for the parties selected the undersigned to act as arbiter to resolve the dispute in accordance with the rules established by the American Arbitration Association.

Parties to the dispute are:

Concrete Pipe and Products Company of California, herein called "Company," and Construction Laborers Pension Fund, herein called "Fund."

Appearing as legal counsel for the parties were:

Dennis R. Murphy, Esq., of Diepenbrock, Wulff, Plant & Hannegan, for the Company

Everett G. Beers, Esq., of Cox, Castle & Nicholson, for the Fund.

The hearing was held on June 25, 1987, in the offices of the American Arbitration Association at Los Angeles, California. A stenographic record was made of the proceeding by a Certified Shorthand Reporter. All witnesses testifying in this arbitration were sworn as was the Arbitrator.

Counsel for the parties were afforded a full and complete opportunity to enter into stipulations, both oral and written; present documentary evidence; examine and cross-examine witnesses; make arguments in support of their respective positions; and file opening and closing briefs.

In a document received in evidence as Joint Exhibit 2, the parties submitted in evidence a Joint Stipulation of Facts as well as opinions and orders from both the United States District Court and The Court of Appeals.

For the purpose of this proceeding, the Stipulation of Facts will not be repeated in *haec verba,* but reference will be made to facts relevant to the resolution of this matter. References may also be made to the District Court's comments as well, as they may be material.

II

The Factual Background

Prior to December 1, 1976, Cen-Vi-Ro, a manufacturer of concrete pipe in Shafter, California, and the Southern California District Council of Laborers, herein called "the Union," were signatories to a Collective Bargaining Agreement which, among other things, obligated the Employer to make payments to the Fund on behalf of employees covered by the Agreement.

On December 1, 1976, the Company, i.e., Concrete Pipe, acquired by purchase the Shafter, California, plant and took over the operation of the production of concrete pipe. As a result of the acquisition of the plant, the Company assumed the Collective Bargaining Agreement of its predecessor and continued to abide by its terms, including making contributions to the Fund.

In 1978, the Company and the Union entered into a new Agreement which, by its terms, required contributions to be made to the Fund for employees for hours worked at the Shafter facility. By its terms, the Agreement was to remain in effect until June 30, 1981. It further provided for automatic renewal from year to year unless either the Union or the Company gave timely written notice of a desire to renegotiate its terms prior to June 30, 1981, or prior to June 30th of each subsequent year of the automatic renewal. It further provided that such written notice shall be given sixty (60) days prior to June 30, 1981, or subsequent June 30th of each year, and if no agreement was reached by June 30, 1981, or thereafter, the Employer or Union could give written notice to each other that on a " . . . specified date not less than fifteen (15) days after the date of said notice, the Agreement shall be considered terminated."

Up until August 1979, the Shafter plant was in full and continuous production of concrete pipe. In August 1979, the Company ceased its production of concrete pipe at Shafter. Further, it stopped purchasing materials; it laid off employees; and started removing machinery for shipment to its Sacramento plant. From October 1979 to the reopening of its plant in November 1981, only two employees worked at the

Shafter plant, one of whom worked from October 1979 through December 1980, and the other worked from November 1979 to the reopening in November 1981. The last contribution made by the Company to the Fund was in May 1980.

Throughout the period of August 1979 through November 1981, the Company searched for additional work in the Shafter-Bakersfield area by sending its salesmen into the area on a regular basis.

In the latter part of 1981, the Company became a successful bidder on a project in the Bakersfield area, known as Wheeler Ridge. As a result of such bidding, the Company was awarded two of the four contracts it bid on calling for the production of 7,000 tons of concrete pipe.

As a consequence of receiving the two contracts, the Company reopened its Shafter plant in November 1981 and employed persons within the classifications of laborers covered by the scope of the 1978-1981 Collective Bargaining Agreement.

In the Spring of 1981, and prior to the Company being awarded its newly bid upon contracts, both the Company and the Union sent timely notices to each other in accordance with their Agreement, giving notice to each other of their desire to negotiate a new bargaining agreement. Negotiations were conducted in October and November 1981. On November 30, 1981, the Company sent the Union a letter stating that the Company was withdrawing recognition of the Union and that an impasse in negotiations had been reached. Said notice sent to the Union of the Company's intended termination of the Agreement was pursuant to the notice provision of the Agreement and which would be effective as far as the date of termination was concerned no earlier than December 15, 1981.

III.

The Factual Question to be Determined

In order to determine whether or not there is a withdrawal liability to the Fund by the Company, the determination of the status of the closing down of the Shafter plant is paramount.

Judge Malcolm Lucas Phrased the question as follows:

> "Did Concrete Pipe permanently close its Shafter plant in 1979, as Concrete Pipe maintains, or did it, as the Pension Trust argues, simply 'mothball' the facility pending its relocation elsewhere in the Union's jurisdiction or pending an increase in business such as apparently occurred in 1981?"

IV

Contentions of the Parties

The Company contends that it is not liable for withdrawal liability because it effected a "complete withdrawal" when it closed its Shafter plant in August 1979 which date is prior to September 26, 1980, the effective date of MEPPA. It is the contention of the Company that the closure of the Shafter plant in August 1979 constituted a permanent cessation of covered operations as that term is defined in MEPPA; hence, the provisions as to withdrawal liability are not applicable to it. Further, the Company contends that Congress recognized the fact that a Company which had permanently ceased a covered operation could reopen at a later time when Congress provided for adjusting the withdrawal liability when such incident occurred (29 U.S.C. § 1387 of ERISA).

The Fund contends that 29 U.S.C. § 1381(a) requires a permanent cessation of covered operations before a "complete withdrawal" occurs and that the temporary idling of the plant in 1979 did not qualify as a complete withdrawal because the plant later went back into full production for a substantial period of time. Hence, the Fund contends that a "complete withdrawal" did subsequently occur on December 15, 1981, the date the Company terminated its agreement with the Union and ended its obligation to contribute to the Fund.

V

Statement of the Law

The applicable provisions of the law are found in 29 U.S.C. § 1381, *et seq.*, which deal with withdrawal liabilities from multi-employer plans after September 26, 1980, and are as follows:

1. 29 U.S.C. § 1383(a) defines "complete withdrawal" as:

> "(a) For purposes of this Part, a complete withdrawal from a multi-employer plan occurs when an employer —
>
> "(1) Permanently ceases to have an obligation to contribute under the plan, or
>
> (2) permanently ceases all covered operations under the plan."

While there are certain modificatons applicable to the Building and Construction Industry and the Entertainment Industry, there was no contention made by either of the parties that said modifications were relevant here.

2. 29 U.S.C. § 1383(e) fixes the date that a complete withdrawal occurs as follows:

> "(e) For purposes of this part, the date of complete withdrawal is the date of cessation of the obligation to contribute or the cessation of covered operations."

3. 29 U.S.C. § 1392(a) provides:

> "(a) For purposes of this part, the term 'obligation to contribute' means an obligation to contribute arising —
>
> "(1) Under one or more collective bargaining (or related) agreements or
>
> "(2) As a result of a duty under applicable labor-management relations law, but does not include any obligation to pay withdrawal liability under this Section or to pay delinquent contributions . . . "

VI
Discussion

Counsel for the parties have no disagreement as to the facts nor have they any disagreement as to the applicable law involved.

The issue to be determined is whether or not the Company met the definition of "complete withdrawal" when it closed its plant in Shafter, California, in August 1979. Judge Lucas in posing the question simply asks the question of whether the closure in 1979 of the Shafter plant was permanent or merely a "mothballing" of the plant; in other words, a temporary situation.

Counsel for the Company notes that the facts presented strongly support the contention that the Company *intended* the closure to be of a permanent nature. In his argument to support his position further, counsel points out that attempts were made to relocate the plant and also to negotiate out of the Company Lease, which counsel contends are facts consistent with the intention to permanently cease operations.

The dictionary definitions are not of a great deal of help in determining the issue here. While Webster's Dictionary does define "permanent" as "lasting indefinitely" and further Webster defines the word "indefinite" by using the term as having "no precise limits," nonetheless, Webster also defines "permanent" as "lasting *indefinitely without change*" (emphasis mine). Black's Law Dictionary defines "permanent" as "*fixed, continuing, lasting, stable, enduring, not subject to change* but *not necessarily perpetual* (emphasis mine). Frankly, the

definitions do not resolve the issue, but simply lends itself to interpretations as to what length of time must elapse before a "temporary" closing becomes "permanent." The very fact that the word "indefinite" is defined in Webster's Dictionary as having "no precise limits" is indicative of the ambiguity which exists when trying to apply the strict definitions to the facts.

Needless to say, when making the determination as to whether a "complete withdrawal" has occurred, the test to be applied is an objective test. The expression of intent to withdraw is irrelevant to the determination of actual withdrawal. *IAM National Pension Fund Benefit Plan C v. Stockton TRI Industries,* 727 F.2d 1204 (DC C.A. 1984). Hence, the overt manifestation of the acts of the Company is the determining factor.

In the instant case, there were documents and testimony in support of the Company's contention that the closing in August 1979 was intended by the Company to be a permanent closure. Notwithstanding the Company's intent, the plant was reopened for full production in November 1981 which negates a determination of permanent cessation of operations.

Both counsel have cited the case of the *United Food and Commercial Workers v. G. Bartusch Packing Co.*, 546 F.Supp 852 (1982) in support of their respective positions. Accordingly, an analysis of the case is warranted.

In *Bartusch*, the Employer had shut down his operation prior to the effective date of MEPPA. At the time of the closure, all the employees were laid off indefinitely. It was conceded that the Employer intended the closure to be temporary in that he hoped to obtain appropriate financing to reopen the plant and resume operations. The Employer's attempts to obtain financing were unsuccessful and as a result thereof, the plant never reopened and the employees were never rehired.

The Pension Plan argued that since the Employer had not intended the closure to be permanent but in fact intended it to be temporary, the complete withdrawal had not occurred prior to the effective date of MEPPA; hence a withdrawal liability was incurred.

The Court disagreed with the argument of the Pension Plan when it held that the intent of the Employer was irrelevant in determining whether a permanent cessation of covered operations occurred. The

Court stated:

> "Regardless of its intention . . . the failure of the plant to ever reopen means that the initial closing was permanent" (*Id.*, at 857).

Counsel for the Fund in the instant case has relied on the *Bartusch* case in support of his argument that intent is immaterial and the cold facts are that the Company did reopen its plant for full production in November 1981.

On the other hand, counsel for the Company looks to the *Bartusch* case in support of his argument that a "permanent cessation of covered operations can occur even if an employer has the ability and even the intent to reopen."

In reading the *Bartusch (supra)* and *Stockton TRI Industries (supra)* cases, it appears convincing to the undersigned that the intent is irrelevant and the objective test to determine when the complete withdrawal has occurred is the standard to be used.

While there was considerable evidence to the effect that the Company had attempted to locate a new plant in the San Bernardino-Riverside area, nonetheless, there was also evidence to the effect that two employees worked at the Shafter location at such duties as acting as plant custodian, plant security and answering calls regarding the unsold inventory. Further, the Company renewed its Lease for an additional year. Still further, there is evidence that during the period of the closure from August 1979 to November 1981, salesmen were in the Shafter-Bakersfield area attempting to obtain orders for work.

Last, but not least, the fact that the Company bid on four (4) contracts and were awarded two (2) contracts for the production of concrete pipe resulting in the plant reopening and employing persons within the classifications of laborers covered by the scope of 1978 to 1981 is a fact that cannot be ignored in imposing the objective test in determining when a complete withdrawal occurred.

Parenthetically, the fact that the Company gave notice to the Laborers' Union in the Spring of 1981 of its desire to renegotiate the Collective Bargaining Agreement for the Shafter plant is wholly inconsistent with the Company's position that there was a cessation of covered operations at the time the Shafter plant closed in August 1979.

VI
Conclusion

It is concluded, therefore, that based upon the objective facts and in answering the factual question raised by Judge Malcolm Lucas, it is found that:

> Concrete Pipe did not permanently close its Shafter plant in 1979 but simply "mothballed" the facility pending an increase in business as a result of which it reopened its plant and hired employees in classifications covered by the Labor Agreement. Accordingly, Concrete Pipe is liable under MEPPA for withdrawal liability.

Dated August 26, 1987

KENNETH M. SCHWARTZ
Arbitrator

PROOF OF SERVICE BY MAIL

I am over the age of eighteen years and not a party to this action. I am employed in Los Angeles County at Cox, Castle & Nicholson, 28th Floor, 2049 Century Park East, Los Angeles, California 90067, which is the office of a member of this court's bar at whose direction I served the following document(s).

On November 18, 1987, I deposited document(s) in the United States mail at Los Angeles, California, sealed in an envelope(s) with full postage prepaid.

The document(s) was entitled:
Status Report on Arbitration Proceedings

The envelope(s) was addressed to:
Dennis R. Murphy
Diepenbrock, Wulff, Plant & Hannegan
300 Capitol Mall, 17th Floor
Sacramento, California 95814

I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct.

November 18, 1987 Irene L. Tetreault

AMERICAN ARBITRATION ASSOCIATION

In the matter of Arbitration	)	
	)	No. 72-621-0001-87
Between	)	MEPPA
	)	
CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA	)	
	)	
and	)	
	)	
CONCRETE PIPE AND PRODUCTS COMPANY OF CALIFORNIA	)	

DECISION AND AWARD

of

KENNETH M. SCHWARTZ
Arbitrator

Dated: August 16, 1988

Introduction

This is the second phase of a bifurcated arbitration proceeding between Construction Laborers Pension Trust Fund for Southern California ("Trust") and Concrete Pipe and Products Company of California ("Concrete Pipe"). This proceeding was conducted pursuant to an order of the United States District Court for the Central District of California and was in accord with Section 4221 of the Multi-Employer Pension Plan Amendments Act of 1980 (MEPPA). The hearing was held in Los Angeles, California, in the offices and under the auspices of the American Arbitration Association on February 18, 1988.

Counsel appearing for the Trust were Cox, Castle & Nicholson, by Everett G. Beers, Esq.

Counsel appearing for Concrete Pipe were Diepenbrock, Wulff, Plant & Hannegan, by James M. Nelson, Esq.

The dispute between the parties arose out of the attempts of the Trust to seek an award upholding its assessment of withdrawal liability on Concrete Pipe in the principal amount of $268,168.81.

The first phase of the arbitration hearing was held in Los Angeles, California, on June 25, 1987. As a result of said hearing, this Arbitrator issued his Award on August 27, 1987, at which time he concluded that the withdrawal of Concrete Pipe was covered by MEPPA and that Concrete Pipe would be liable for payment of its share of unfunded vested liability of the Trust Pension Plan when it withdrew from the Plan in 1981.

In this second phase of this proceeding, the issue to be resolved by the Arbitrator is the amount of withdrawal liability due the Trust based upon the applicable law.

I

Facts Pertinent to Resolution of the Amount of Withdrawal Liability

The parties to this proceeding had entered into a stipulation of facts in the District Court proceeding docketed as *Construction Laborers Pension Trust For Southern California v. Concrete Pipe of California,* Case No. CV 82-5184.

For purposes of convenience, the relevant paragraphs of said stipulation are summarized and set forth below:

Concrete Pipe is a California corporation doing business within the Central District of California; the Trust is an expressed Trust

organized under the Labor-Management Relations Act of 1947, as amended; that said Trust is an express Trust formed under a Trust Agreement entered into among the Southern California District Council of Laborers ("Union") and several multi-Employer associations; that said Trust primarily covers employees in the building and construction industry and is managed by a Board of Trustees, half of whom are selected by the Union and the other half selected by the multi-Employer associations.

The Trust derives revenues from Employer contributions made by Employers bound to Collective Bargaining Agreements with the Union; these Collective Bargaining Agreements require signatory Employers to make contributions to the Trust for each hour worked by employees within the bargaining units covered by the Collective Bargaining Agreements involved.

Cen-Vi-Ro and the Union (as well as the affiliated Local 220 located in Bakersfield) were signatories to such a Collective Bargaining Agreement prior to November 30, 1976, covering terms and conditions of work (including Trust coverage) of employees represented by Local 220 at the Shafter Plant.

On and before November 30, 1976, a plant for the manufacture of concrete pipe located at Shafter, California, was owned by Cen-Vi-Ro and as of December 1, 1976, this plant became owned by Concrete Pipe and has been owned by it at all times since that date.

On December 1, 1976, and thereafter, Concrete Pipe honored the terms of the Collective Bargaining Agreement between Cen-Vi-Ro and the Union which expired in 1978. On November 27, 1978, Concrete Pipe entered into a new Collective Bargaining Agreement with the Union which likewise provided for contributions to the Trust for each hour worked by employees within the bargaining unit covered by the Collective Bargaining Agreement. This Agreement contained provisions in respect to the appropriate notices to be given by the parties to each other in respect to terminating the Agreement.

Pursuant to the Trust Fund contribution provisions of the new Agreement signed by the Union and Concrete Pipe on November 27, 1978, and the Trust Fund contributing provisions of the Agreement between Cen-Vi-Ro and the Union that Concrete Pipe had honored since December 1, 1976, Concrete Pipe had paid the Trust $102,656.68.

On April 21, 1981, the Union sent the appropriate notice of

reopening of the Labor Agreement for negotiations, as did Concrete Pipe likewise on May 1, 1981.

For reasons not material to this phase of the proceedings, negotiations broke down resulting in an impasse between the parties.

On August 17, 1979, Concrete Pipe ceased production at the Shafter Plant.

For hours worked in May 1980, Concrete Pipe contributed $48.60 to the Trust. That was the last contribution of Concrete Pipe to the Trust.

On January 20, 1982, the Trust notified Concrete Pipe of its alleged withdrawal liability of $268,168.81 and demanded payment with a prescribed schedule.

Concrete Pipe has not made any payment on the alleged withdrawal.

Concrete Pipe has not been financially incapable of paying any scheduled benefit to any of its beneficiaries.

The Trust has been informed by its independent actuary, The Martin E. Segal Company, Inc., that as of December 31, 1981, it had an aggregate unfunded vested liability of *$532,621,400*; that as of December 31, 1980, it had an unfunded vested liability of *$514,181,200*; and that as of December 31, 1979, it had an unfunded vested liability of *$493,322,600*. (The stipulation shows as of December 31, 1979, an aggregate unfunded vested liability in the amount of *$532,621,400*, whereas Exhibit "F" to the stipulation, entitled "Report on Employer Withdrawal Liability," shows in Section II, entitled "The Plan's Withdrawal Liability Pools," the amount as of December 31, 1979, to be *$493,392,600*.)(Emphasis mine)

No shareholder, officer, director, agent or representative of Concrete Pipe has, during the period from 1976 to the present date, had any participation in:

(a) the investment decisions pertaining to the assets of the Trust;

(b) the decisions of the Trust to adjust Pension Benefit levels;

(c) the decisions affecting the Trust's administrative costs; or

(d) the selection of actuarial assumptions or methods upon which Concrete Pipe's asserted withdrawal liability

has been calculated.

The Trust's decisions are made by the Trustees. At no time did Concrete Pipe choose to apply for membership or belong to any of the multi-Employer Associations who select one-half of the Trustees on the Board of Trustees, nor had Concrete Pipe ever been denied membership in said Associations.

II
Contentions of the Parties

A. **Concrete Pipe contends that:**

1. The actuarial assumptions and methods used in computing its withdrawal liability were not reasonable in the aggregate; moreover, the computations contained significant errors in the application of the actuarial assumption, used such as:

(a) accrual of contributions from other Employers in assessing Concrete Pipe's withdrawal liability;

(b) incorrect application of Trust's own actuarial standards in computing the withdrawal liability; and

(c) use of actuarial assumptions which are unreasonable when considered individually and result in the over-all actuarial assumptions and methods being unreasonable in the aggregate.

2. Presumption contained in 29 U.S.C. Section 1401 that the decisions by the Trust and the Trust Fund's actuary are presumed correct result in an unconstitutional deprivation of due process. Further, that the preponderance of the evidence establishes that the withdrawal liability determination is clearly erroneous.

3. There are reasonable actuarial assumptions which can be applied to this case which would result in reducing the withdrawal liability to $41,523.15.

B. **The Trust contends that:**

1. The two-tiered Segal method of calculating the Trust's unfunded vested liability was based in the aggregate, on reasonable actuarial assumptions, and therefore the Trust's determination of the amount of withdrawal liability should be upheld.

2. The Trust's actuarial assumptions made in accounting for unrecorded past service credit were reasonable, having been based on an objective and statistically significant survey.

3. Requiring a withdrawing Employer to pay the same share of the Plan's unfunded vested liability (exclusive of interest) regardless of whether it pays in a lump sum or in installments is reasonable.

4. The presumption in favor of the Trust that requires a withdrawing Employer to carry the burden of proof that Trust's determinations are unreasonable is simply a constitutional allocation of burden of proof to Employer in withdrawal liability cases; hence, in order to defeat Trust's calculations, Concrete Pipe has burden of showing that the determination was "unreasonable or clearly erroneous."

5. When Concrete Pipe purchased Cen-Vi-Ro and continued its obligation to contribute to the Trust, Concrete Pipe inherited Cen-Vi-Ro's contribution history; hence, is liable for the full share of withdrawal liability, plus accrued interest.

III

Analysis, Discussion and Conclusions

A. Constitutionality of 29 U.S.C. § 1401(a)(3)(A).

Concrete Pipe has raised the question of the constitutionality of the presumption in 29 U.S.C. Section 1401(a)(3)(A). The argument made is that the section is void because it "unconstitutionally" violates Concrete Pipe and Products' right to an impartial decisionmaker, and hence, its right to procedural due process of law.

While the arguments made by counsel for Concrete Pipe are thought provoking, nonetheless, this Arbitrator shares the view of counsel for the Trust as to what the arbitrator's role is in this proceeding. It is clear that the question of constitutionality of statutory provisions should be adjudicated in court proceedings. As pointed out by the court in *Republic Industries v. Central Pennsylvania Teamsters Pension Fund,* 693 F.2d 290, 296 (3rd Cir. 1982):

> "(T)he legislature could not have intended to defeat separation of powers principles by allowing an administrative tribunal to review the constitutional validity of a statute — a function reserved for the judiciary. It would be unconstitutional, therefore, to compel the arbitrator to review the facial constitutionality of MPPA."

It should be noted that the matter of the constitutionality of the statutory provisions of ERISA presumption was upheld by the Ninth

Circuit Court of Appeals in the case of *Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials,* 749 F.2d 1396; *cert. denied,* 471 U.S. 1054. It is recognized that the Third Circuit in the case of *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.,* 787 F.2d 128, held the presumption of correctness to be unconstitutional. Notwithstanding the *Yahn* case, the law in California, being in the Ninth Circuit, is as stated in the *Thompson* case, *supra,* decision, namely, that the provisions of Section 1401 are constitutional.

This Arbitrator is fully in accord with the decision of the court in the *Republic Industries* case, *supra*; hence, believes that the issue of constitutionality of the statute is for the Federal Courts and not the Arbitrator.

B. Whether Concrete Pipe When it Purchased Cen-Vi-Ro's Business and Continued Cen-Vi-Ro's Obligation to Continue to the Trust, Inherited Cen-Vi-Ro's Contribution History and, Hence, Became Liable for its Full Share of Withdrawal Liability of $268,168.61, Plus Accrued Interest.

The Trust contends that Concrete Pipe inherited the contribution history for 1976, the year in which it purchased Cen-Vi-Ro and is, therefore, liable for its full share of withdrawal liability as indicated herein. The Trust relies upon the express words found in the statute in Section 1384(b) in support for its position. Said Section provides:

> "(T)he liability of the purchaser shall be determined as if the purchaser had been required to contribute to the plan in the year of the sale and the 4 plan years preceding the sale the amount the seller was required to contribute for such operations for such 5 plan years."

The argument by the Trust is that, in the instant case, Concrete Pipe inherited the contribution history for 1976, the year in which the purchase took place.

Furthermore, the Trust argues, even if the express words of MEPPA did not so provide, Concrete Pipe would nevertheless be liable under the labor law "successorship doctrine."

The reliance of the Trust on Section 1384, in the opinion of the Arbitrator, is misplaced.

The provisions of MEPPA as they relate to withdrawal liability of employers withdrawing from multi-employer pension plans is applicable to all employers withdrawing from such plans on or after September 26, 1980. Under the provisions of the Act, the employer who withdraws from the plan is liable to the plan for the employer's allocable share of the plan's unfunded vested benefits. The unfunded vested benefits are defined as the difference between the assets of the trust and the current discounted value of all vested benefits eventually to be paid participants.

The Purchase and Sale Agreement between Cen-Vi-Ro and Concrete Pipe negotiated in 1976 is obviously not in compliance with the provisions of 29 U.S.C. Section 1384, for the purposes of shifting the liability from the seller to the purchaser. The Purchase Agreement having been entered more than four (4) years prior to the enactment of the statute, there was no way for the parties to anticipate the statutory provisions. The Purchase and Sale Agreement did not provide for or require the purchaser to contribute to the Trust; nor did it compel the purchaser to post a bond or ensure that Cen-Vi-Ro was secondarily liable for withdrawal liability in the event Concrete Pipe withdraws as is provided for in 29 U.S.C. Section 1384.

Concrete Pipe's contention that Congress provided by statute in Section 1384 an exclusive mechanism for shifting liability as described herein has much merit.

In *Continental Inc. and Bakery Workers Pension Fund,* 5 EBC 1326 at 1336, Arbitrator Mittelman concluded that silence of the statute with respect to the pre-MEPPA sales of assets "is not an invitation to arbitral and judicial creativity" and that it must be regarded as "evidence of congressional intent to preclude its application." It is a conclusion with which this Arbitrator agrees.

An analysis of Section 1384 regarding conditions under which a seller's obligation to contribute and its contribution history is spelled out in the Section: In December of 1982, the PBGC concluded that this section of the statute provided the exclusive method by which a seller may avoid withdrawal liability by transferring its obligation to an arms-length purchaser.

In the *Continental* case, *supra*, at 1337, the Arbitrator states, "One simply must assume in the absence of even a glimmer in the legislative history of the Act indicating an assumption or belief that other

principles of successorship might be applicable, that Congress intended and believes that Section 4204 provided the exclusive method of and criteria for applying successorship principles to *bona fide* arms-length sales of assets cases."

Hence, the refusal of Congress to provide for an automatic transfer of withdrawal liability must be construed to preclude the transfer of Cen-Vi-Ro withdrawal liability to Concrete Pipe.

The language found in *Massachusetts Mutual Life Insurance Company v. Russell,* 473 U.S. 134 (1985), may very well be depositive of the issue, where the Court held:

> "We are reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA. As we stated in *Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11, 19, 62 L.Ed.2d 146, 100 Supreme Court 242 (1979): '(W)here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.' (Cite omitted) 'The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme, including an integrated system of procedures for enforcement.' (Cite omitted)" 473 U.S. 148.

The second contention of the Trust relates to the labor law doctrine of successorship.

Concrete Pipe points out, and properly so, that the only published decisions which have discussed the applicability of the "successor employer doctrine" as it relates to withdrawal liability have been rejected. The cases cited by Concrete Pipe in support of its contention of the inapplicability of the "successorship doctrine" are: *Richland Industries Ltd v. Robins,* 617 F.Supp. 639 (N.D. Illinois 1985); *Paperworkers Local 286 Pension Plan and Kardon Industries, Inc.,* 6 EBC 2398 (1985); *Superior Pocahontas Inc. v. Island Creek Coal Co.,* 657 F.Supp. 796 (S.D. W.Va. 1987).

The Trust's contention in respect to the "successorship doctrine" finds no support in court cases. The following citation from the *Massachusetts Mutual Life Insurance Company v. Russell* case, *supra,* 473 U.S. at 146, " . . . the assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking interrelated and independent remedial scheme which is in

turn part of a comprehensive and reticulated statute," makes it clear that Congress did not intend to imply a remedy not specifically spelled out in the statute.

In the labor law field, the successorship cases relied upon by the Trust are: *John Wiley & Sons v. Livingston,* 376 U.S. 543 (1964); *NLRB v. Burns International Security Services, Inc.,* 406 U.S. 272 (1972); *Golden State Bottling Co. v. NLRB,* 414 U.S. 168 (1973); *Howard Johnson Co. v. Hotel Employees,* 417 U.S. 249 (1974), as well as the *Fall River Dyeing and Finishing Corp. v. NLRB,* 96 L.Ed.2d 22 (1987).

The court in the above-cited cases basically held that if it finds the employer to be a successor, then the successor assumes the obligation of bargaining collectively with the employees' representative which, of course, is quite different from assuming the Collective Bargaining Agreement of its predecessor.

For Concrete Pipe in order to be liable for the obligations of Cen-Vi-Ro, it would have to be shown that Cen-Vi-Ro, at the time of the transfer, had such an obligation in the first instance. To reiterate, the transfer of ownership took place in 1976, long before the enactment of MEPPA. Since Cen-Vi-Ro had no such withdrawal liability at the time of the transfer of ownership, no such transfer of liability to Concrete Pipe could take place.

In summary, since contractual liabilities under the successorship doctrine, as enunciated in *John Wiley & Sons v. Livingston, supra,* and *Golden State Bottling Co. v. NLRB, supra,* and others cited, are not applicable since the court did not require the parties to abide by the terms and conditions of the Labor Agreement, to which it had not agreed (unless it could be shown that the employer had actual notice and could have protected himself against such liability). In any event, for the reasons enunciated in *Richland Industries Ltd., supra,* it is concluded that the cases governing successor employers in labor cases have no application in ERISA cases.

As was pointed out in the *Richland Industries* case, at page 641, "A new employer, in other words, may be a successor for some purposes and not for others." The court further states, "In particular, Section 1384 of ERISA clearly establishes that a purchaser of assets may not be held liable for the seller's contribution history, absent a special arrangement with the seller by which the purchaser voluntarily assumes the liability."

It is clear that there could have been no voluntary arrangement between the seller, Cen-Vi-Ro, and the purchaser, Concrete Pipe, since neither party in 1976 was aware of a liability which was in the future to be known as withdrawal liability.

Accordingly, it is concluded that based upon the reasoning above, Concrete Pipe did not inherit the one-year contribution history of Cen-Vi-Ro when Concrete Pipe acquired ownership of the plant in 1976; hence, it is not liable for the share of withdrawal liability which was included by the Trust in its original calculation.

The contention by the Trust that the issue of Cen-Vi-Ro's contribution was not timely raised is without merit. There is sufficient evidence in the record to show that the issue was raised in at least 1982 and thereafter. In the instant phase, the ultimate issue to be resolved is the *amount* of Concrete Pipe's withdrawal liability to the Trust; accordingly, the matter of Cen-Vi-Ro's contribution is properly before the Arbitrator.

In its Closing Brief, the Trust has attached as Exhibit A the monetary consequence of a holding that one year of contribution be eliminated by recomputing the withdrawal liability. The adjusted withdrawal liability, taking into account the exclusion of the one year of Cen-Vi-Ro contribution history, reduces the withdrawal liability of Concrete Pipe to $190,465.57. Incidentally, Concrete Pipe, in its Reply Brief of May 27, 1988, acknowledges the correctness of the amount as recomputed.

C. Were Actuarial Assumptions and Methods Reasonable in the Aggregate?

The statutory standards for reviewing the correctness of the actuarial calculations and assumptions are set out in 29 U.S.C. 1393(a)(1) and 1401(a)(3).

Section 1393(a)(1) provides, in pertinent part:

> "Withdrawal Liability under this part shall be determined by each Plan on the basis . . . actuarial assumptions, which, in the aggregate are reasonable taking into account the experience and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the Plan."

Further, Section 1401(a)(3) provides:

> "(A) For purposes of any proceeding under this section, any determination made by a Plan sponsor under

Sections 1381 through 1399 of this title and Section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

"(B) In the case of the determination of a plan's unfunded vested benefits for a plan year, the determination is presumed correct unless a party contesting the determination shows by a proponderance of the evidence —

"(i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the Plan and reasonable expectations), or

"(ii) the Plan's actuary made a significant error in applying the actuarial assumptions or methods."

In the case of *Michigan UFCW/Food Employers Pension Fund v. Eberhard Foods, Inc.*, 831 F.2d 1258 (6th Cir. 1987), the court upheld the Arbitrator's decision that the interest rate (6%) was not unreasonable. It held:

"The burden of proof is on the employer. In meeting the burden, the test is not which withdrawal determination is the most reasonable but rather whether the challenged determination is unreasonable or clearly erroneous."

In recognizing the fact that actuaries may have different opinions, the court in *Eberhard, supra,* stated at page 1261:

"As the First Circuit observed in *Keith Fulton & Sons v. New England Teamsters,* 762 F.2d 1137 (1st Cir. 1985), the actual determination of withdrawal liability is not an exact science and therefore there is a range of reasonable actuarial determination of withdrawal liability (citation) Eberhard's actuary acknowledged this point, stating, 'I don't think there is a single answer as to reasonableness.' (citation) The statute does not anticipate that the actuary will always choose as the most reasonable from among the range. Rather, the only requirement is that in every case the actuarial determination will fall within the range of reasonableness . . . taking into account the unique characteristics of the Fund."

As pointed out by the Trust, all the Circuits with the exception of the Third Circuit in *United Retail v. Yahn,* 787 F.2d 128 (3rd Cir. 1986), have upheld and enforced the presumption.

In the instant case, the Martin E. Segal Company, the Trust's actuary, in calculating withdrawal liability used a method which takes into account a withdrawing employer's contributions to the Trust for a period of ten (10) years relative to the contributions of all other employers. The withdrawing employer is responsible for a proportional share of the Trust's "unfunded vested benefits" as that term is defined in Section 4213(c), i.e., as the value of nonforfeitable benefits under the Plan, less the value of assets of the Plan.

The Martin E. Segal Company has developed through the years a method which provides for two distinct interest rates. The method is sometimes referred to herein as the "two-tiered" method. The rates used under the Segal method are (1) the interest rates published by the PBGC for single employer plan terminations, and (2) the interest rate used by a pension plan for its funding valuation.

As between the two rates, the PBGC rate is fairly high while the rate for funding the Plan is relatively low.

What this method does is to provide for a blending of the two rates to arrive at the value of the nonforfeitable benefits.

To the extent that the market value on hand covers the liability, the investment return developed by the PBGC for single employer terminations would be applicable to determine the coverage provided by those current assets. In the instant case, as of December 31, 1980, and December 31, 1981, the corresponding investment return assumptions were 9.25% and 8.50%.

To the extent the unfunded vested liability cannot be covered by the current assets (as is the case herein, where only one-third of the liability could be covered by the current assets), the remaining liability is determined by using the investment return rate of 6.0%, which is the same investment return rate assumption used by the Trust for funding purposes.

The explanation made by the Trust actuary is simply that hypothetically the current assets could be converted into cash and immediately invested to insure the payments of benefits in the future.

As should be pointed out, the investments on hand at the PBGC rates would not be sufficient to cover the liability for vested benefits and

as a result thereof, the Trust actuary was required to make his "best estimate" based upon a long-range investment return. The Trust actuary made it clear that while PBGC rates could be applied to "money on hand," those rates could not be applied where funds are not available since there is no way to "lock in" a rate to funds which may be available in the future.

The Trust actuary in making his best estimate as to the future investment return based his estimate taking into account (a) historical long-term investment rates, and (b) the Trust's own personal investment history. In doing so, the Trust actuary took into account the ten (10) year period from 1971-1980 and determined the *average* return for the period to be 6.85%. With that history in mind, the Trust actuary determined the 6.0% rate, which is the funding rate, to be reasonable taking into account further the melding of the PBGC rates of 9.25% and 8.5%. As can be seen, the melded rate is very close to the historical performance of the Trust.

Concrete Pipe in asserting the "two-tiered" rate was unreasonable called as its expert actuary witness Mr. Jon L. King. Mr. King is an enrolled actuary (Co. Exh. 13), and is presently employed as manager of Buck Consultants' Los Angeles office. He has been employed as a consulting actuary by Buck since 1986. King testified that his experience in pension plans has been limited to single-employer pension plans. Also, that Buck Consultants has no clients in California among the multi-employer pension funds.

King stated that he had reviewed the data upon which the actuary assumptions were made in the instant case and determined that there were three assumptions that concerned him: (1) the net income assumptions, (2) unrecorded past credit assumption, and (3) lastly, the interest rate assumption. King allowed that the first two assumptions had minimal impact, so he focused on the interest rate assumption in coming to the conclusion that it was "unreasonable in the aggregate."

King further testified that he looked at "economic realities" in his analysis, "rather than looking at what assumptions are being used for this and that purpose by other actuaries." King pointed out that he doesn't believe in following the "herd" (of actuaries).

In support of King's contention of the interest rate assumption being too low, King used his firm's published interest rates, entitled "Buck Forward Rates," which are a set of interest rates derived from the

actual marketplace for risk-free United States securities, i.e., treasury bills and U. S. Government bonds and notes.

King expressed the opinion that he did not believe the assumptions used for funding were applicable to withdrawal liability cases and that not only was the interest rate assumption too low, but that the PBGC interest for single employer terminations was too low as well.

The standard that Mr. King would apply in consideration of whether the interest rate assumption was unreasonable or not would be that if it met the interest rate of the "Buck Forward Rates," it would be reasonable; otherwise, not.

It is interesting to note that King was unable to state any multi-employer pension fund which has used the "Buck Forward Rates" method.

It is noteworthy to point out the lack of expertise King has in respect to multi-Employer Pension Funds. There is a real difference between a multi-Employer Pension Fund and a single Employer Fund. In multi-Employer Funds, in a withdrawal situation, there is an ongoing continuation of the Plan. The employees of the withdrawing Employer are not dropped as participants of the Plan, but will continue to remain participants until such time as they are eligible for retirement benefits. Further, notwithstanding the withdrawal of the Employer, the continuing Employers must continue their contributions to the Plan and the withdrawing Employer's obligation to the Plan must be balanced against the obligation of the Employers continuing to make contributions. In the termination of a single Employer plan, obligations to all plan participants are fixed and paid as of a certain date.

During his testimony in respect to reasonableness, King refers to the realities of the marketplace and competitive rates.

Actuaries, for the most part, agree that a funding valuation is not an exact science and, accordingly, there does not appear to be any one answer in defining "reasonableness." That being the case, the standards in the statutes, the court cases, as well as the arbitrators' decisions, must be looked to in determining whether the facts in each case come with the parameters of the term "reasonable." In the *Eberhard* case, *supra*, the court upheld the Arbitrator's decision that the interest rate (6%) was *not* unreasonable.

While the actuary witness testifying for Concrete Pipe concludes that the Segal method in the determination of interest rate assumptions

are unreasonable, he ignores 29 U.S.C. 1393(a)(1) of ERISA which mandates that the actuary take into account the experience of the plan and reasonable expectations. This the Segal Company has done in coming up with its best estimate.

Concrete Pipe's actuary concludes that the "two-tiered" method used in the computation of the withdrawal liability and the interest rate assumption used for funding, as well as the PBGC rate, are "unreasonable in the aggregate."

The specific Segal method of using the interest rate assumption and the PBGC rates of interest comprising a blended rate have been the subject of numerous Arbitrator decisions.

Arbitrator William Hannan, in *Joy Mfg. Co.*, 5 EBC at 1135 (Feb. 1984), stated, "When we take into consideration that the 'blended rate' is a combination of the funding rate and the higher PBGC rate, we have an applicable rate which produces a withdrawal liability lower than the not unreasonable rate which most actuaries would have calculated . . . "

In *Ellis and Construction Laborers Pension Trust*, 5 EBC at 1175-76 (Feb. 1984), Arbitrator Martin Zimring upheld the use of the Segal formula as to the blending of rates.

Walter Slater, the Arbitrator in *J. L. Denio, Inc. and Operating Engineers Pension Trust*, 8 EBC at 1990 (June 1987), states, "The boundaries of reasonableness appear to be PBGC rates on the high side and funding valuation rates on the low side. Somewhere in between we find such as the Segal Company's blend."

Concrete Pipe has the burden of rebutting the presumption of Section 1401 of ERISA and establishing by a preponderance of the evidence that the determination of the Plan sponsor was unreasonable. This they did not do.

IV

Conclusion

It is concluded, therefore, that Concrete Pipe has failed to carry the burden of overcoming the statutory presumption by a preponderance of the evidence.

V

Attorneys' Fees and Costs

Each party in this proceeding has requested that the legal expense,

in the event of a successful result, be assessed against the other party. The Arbitrator does not feel justified in allocating either party's legal expense to the other. Both parties have acted in good faith and have diligently and professionally urged their respective positions; hence, each party will bear its own legal expenses and costs.

AWARD

At the outset of this phase of the arbitration proceedings, the parties agreed that the Arbitrator, after having taken evidence, hearing arguments as well as studying the briefs filed, would determine the money amount of the withdrawal liability due the Trust from Concrete Pipe and Products Company of California and render an appropriate award. Based upon the reasons aforesaid stated, the award is as follows:

1. Concrete Pipe and Products Company of California has failed to show by a preponderance of the evidence that, in the aggregate, the actuarial assumptions and methods used by the Trust in the determination of Concrete Pipe and Products Company of California were unreasonable.

2. Concrete Pipe and Products Company of California is not liable for the one-year contribution history of Cen-Vi-Ro which was included in the Trust's original calculation.

3. Concrete Pipe and Products Company of California is liable for withdrawal liability of $190,465.57, plus accrued interest, to the Trust which the Trust acknowledges is the calculation of the liability using the same actuarial assumptions and methods as were applicable in the original calculation, except that the one-year contribution history of Cen-Vi-Ro is eliminated.

4. The Arbitrator's fees and expenses together with the administrative fees of the American Arbitration Association shall be shared equally by the parties. Each party shall bear its own costs and legal expenses.

KENNETH M. SCHWARTZ, Arbitrator

Dated: August 16, 1988

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE MALCOLM M. LUCAS, JUDGE PRESIDING

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA, Plaintiff, vs. CEN-VI-RO CONCRETE PIPE & PRODUCTS, INC., Defendant.	)	No. CV 82-5184-MML
CONCRETE PIPE & PRODUCTS COMPANY OF CALIFORNIA, Plaintiff, vs. CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA, Defendant.	)	No. CV 83-132-MML

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Monday, March 19, 1984

DON MEHLER, CSR
Official Reporter
442 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

APPEARANCES:

For Construction Laborers Pension Trust for Southern California:

COX, CASTLE & NICHOLSON
By: EVERITT G. BEERS
2049 Century Park East, 28th Floor
Los Angeles, California 90067

For Concrete Pipe & Products Company, Inc.:

DIEPENBROCK, WULFF, PLANT & HANNEGAN
By: DENNIS R. MURPHY
455 Capitol Mall, Suite 800
Sacramento, California 95814

LOS ANGELES, CALIFORNIA, MONDAY, MARCH 19, 1984; 10:00 A.M.

(Other court matters.)

THE CLERK: Item No. 15, CV 82-5184, Construction Laborers Pension Trust for Southern California v. Cen-Vi-Ro Concrete Pipe & Products, for cross-motions for summary judgment.

Counsel, state your appearances, please.

MR. BEERS: Everitt Beers, Cox, Castle & Nicholson, for the Construction Laborers Pension Trust.

THE COURT: Good morning.

MR. MURPHY: Dennis Murphy appearing on behalf of Concrete Pipe & Products Company.

THE COURT: Good morning, gentlemen.

I have read and considered what has been filed in this matter. Does either side wish to be heard further?

MR. MURPHY: Your Honor, Concrete Pipe & Products would just like to address a few issues. In our briefs we addressed very technical legal points, and I would just like to point out a few pragmatics of the situation. I think it's necessary to understand, in discussing the constitutional arguments, the retroactive effect of the particular actions. As you know, the unions on behalf of their clients, the employees, demand that employers enter into these multi-employer plans. Employers agree for a certain sum of money and then set their prices for their goods and services based on the contractual rate of pay. And in this case, our client stopped producing the widgets — in this case, concrete pipe — two years before or a year and a half before the act was passed. All their financial transactions are closed. There is no way to recover the money. And now we are being assessed almost two times what we paid as unfunded liability upon withdrawal from the trust fund. And while the act is not retroactive in that it is applying —all the arguments don't go to that — it is retroactive in its effect in its total application to this particular person or this particular business and should be viewed as such, your Honor, because there is absolutely no way for Concrete Pipe & Products Company to recover one dime of the money by way of increasing its costs of its product. I think that's a very important issue.

I think that also, the act is passed, and the financial impact upon

somebody going out of business is disastrous and has to be considered a taking of money from one to another, as the Alton case, which was cited by the Ninth Circuit as good authority, properly points out. To me, that is the practical effect of what is going on. They're going into closed transactions. They're taking money from one and potentially bankrupting one to give money to another, despite contract provisions that specifically prohibit this.

With respect to another area, I would like to point out the pragmatic effect. In this particular case, the trust funds come in with a presumption that their decisions are correct. They are entitled to determine the amount of liability under four formulas. They don't have to state any method which they choose the formula. It can be relevant or not relevant. They can go from 5 percent on actuarial rates to 9, 10, 12, and based on whatever they do, you can go from zero liability to hundreds of thousands of dollars, and their judgment is presumed correct in litigation, and there is no rational basis for this. In fact, the statute on that point not only presumes them to be correct, but is extremely vague in saying what basis they use in making their determination. They don't have to use data. They can use their best estimates of what is correct. And if they don't have sufficient base data they can use a sampling of data. And all that is required is that in the aggregate, it be reasonable or their best estimate.

And I feel that all these things have got to be considered in determining whether my clients have been given any real due process in this issue.

THE COURT: All right. Let me ask, Mr. Murphy, do you agree that the threshhold question may well be, the factual question, that is, when Concrete Pipe withdrew? If Concrete Pipe did, from a factual standpoint, cease operations in 1979, in essence, withdrawing from the pension trust plan, then we would never reach the constitutional issues in this —

MR. MURPHY: Well, that's our first point, your Honor. We think that we've briefed that capably. I think it comes down to a definition, does permanently cease to cover operations, does the term "permanently" mean lasting forever or does it mean lasting indefinitely, like the opposing side has defined in their brief? We think that this is clearly one that is a permanent cessation of operations under the term "lasting indefinitely."

THE COURT: Well, before we go further into the merits of that question, it is a factual question and will have to be resolved further in processing this case. But in terms of the resolution of that factual dispute, who is to resolve it, the court or an arbitrator?

MR. MURPHY: I think, your Honor, the court is to resolve it, because our position on that is simple. If we did in fact withdraw in 1979, we never came under this act. We were out from under it. We have no obligations under it. It doesn't involve us. The act was passed in September 26, 1980, and we ceased doing business at this plant on August 17, 1979. And we say that that act involves others, but not us. And its retroactive application only goes back to May of 1980. And clearly, we had stopped producing concrete pipe, we had shipped our equipment to our main plants in Sacramento, we had laid off our employees, we were searcing for a new plant in San Bernardino or Riverside. We had done everything possible to terminate our business at that particular plant. And we believe that all the facts are basically undisputed. Both counsel try and draw different inferences from the undisputed facts, but I think the facts are undisputed.

THE COURT: All right. Thank you, Mr. Murphy.

MR. MURPHY: Thank you, your Honor.

MR. BEERS: Your Honor, turning first to the issue of withdrawal, we do think that is an issue that's appropriate for the Court to decide here. All the facts are necessary to decide it. It's just a question of interpreting Section 1383, as to what "permanent" means. We don't think any additional —

THE COURT: So I'm clear as to your position, you do not feel that that factual dispute, the issue and question of the date of withdrawal, is a matter that should be heard by an arbitrator?

MR. BEERS: No, your Honor. We feel that further factual development before an arbitrator would not add to the Court's ability to decide that issue now. But if the Court feels that arbitration is appropriate on the withdrawal issue prior to the Court interpreting the withdrawal provisions, we point out that it would then be necessary to determine the other provisions of the act, which are facial constitutional challenges, and decide the constitutionality of those other provisions as discussed in the papers. Therefore, even if —

THE COURT: Well, I think Shelter Framing said that the constitutional issues, as opposed to factual, do not have to be submitted

to the arbitration process.

MR. BEERS: Correct, your Honor; along with Peick, Textile Workers, and Republic.

THE COURT: All right. Go ahead, Mr. Beers.

MR. BEERS: Okay. Responding to what I think are three points made by Mr. Murphy on his presentation, first of all, he talks about the need to recoup costs in the future for the liabilities incurred by Concrete Pipe at its plant in the past. I point out that withdrawal liability is based upon the employer's proportionate share at the time it withdrew of the employee benefits vested at that time, based upon that particular employer's proportionate share of past contributions, as opposed to total contributions, to the trust. There is no future recouping of costs in the future. This is simply Concrete Pipe paying its fair share of benefits promised to employees at the time it withdrew.

Referring to the takings discussion made by Mr. Murphy, he mentions the case of Alton Railroad. Of course, Alton Railroad is one of the United States Supreme Court cases, along with the cases striking down state child-labor laws and the NRA legislation during the early part of the depression, which the Supreme Court has since, of course, eschewed. The modern rule is in areas of economic regulation, the court hunts through the legislation based upon a not arbitrary or unreasonable standard, and does not address the underlying wisdom of the legislation.

In this case, the three cases that have addressed this issue, the Second, Fourth, and Seventh Circuits in Textile Workers, Republic, and the Peick decisions, have all upheld the MPPAA unanimously.

Particularly turning to the takings issue, there is no takings involved here. All three of those cases have held that for the takings laws to apply, there has to be a physical taking of property by governmental action, such as garnishment or claim of delivery or similar procedures where the government goes out and seizes property. That is not the case here.

The last argument made by Mr. Murphy was regarding the presumption attached to the initial decision of the trustees regarding the amount of withdrawal liability. There' s no constitutional question here. Congress every day and state courts every day set the burden of proof on one side or the other for any matter to be decided by a court. This is simply setting of a burden of proof.

Also, the reasonable actuarial standards test used in the MPPAA for judging and controlling the trustees' setting of withdrawal liability is standard economic legislation. This is economic legislation. It's not legislation in an area involving protective constitutional conduct, such as freedom of speech. The United States Supreme Court has again and again upheld economic regulations requiring various organizations to set reasonable prices or reasonable routes.

In closing, your Honor, I just want to point out that, as carefully discussed in our papers, three circuit-court opinions have addressed every single issue in this case and have unanimously upheld the MPPAA on every single aspect challenged by Concrete Pipe. The case of Shelter Framing, which is discussed at length in Mr. Murphy's papers, addressed the sole issue of the constitutionality of the retroactive date of the MPPAA. That case expressly limits its decision to that small part of the MPPAA. While the Construction Laborers Pension Trust urges your Honor to follow the three decisions that have addressed every issue of the case, if your Honor for some reason finds part of Shelter Framing to be applicable to the facts of this case, we request that your Honor stay this action until the Supreme Court decides Shelter Framing. It is —

THE COURT: The petition for certiorari is still pending before the Supreme Court, is it not?

MR. BEERS: Correct, your Honor. The petition for cert is pending, but the joint appeal, which is part of the same decision of Gray, has had probable jurisdiction noted. That's a federal appeal. The Supreme Court has noted jurisdiction in Gray, scheduled oral argument for April, and the petition for cert has been at each session of the court left pending, which I understand is the normal procedure for the United States Supreme Court when it has two cases that involve the same factual issue, to either grant cert or note probable jurisdiction on one and just keep the other pending. Since the Supreme Court next to never, except for maybe the Sony case and a couple others, carries decisions over from term to term, I would expect a decision to be written by the United States Supreme Court by the end of this term in July. So if the Court finds Shelter Framing to be at all controlling, I simply request the Court stay further decision in this case until that decision comes out by the end of the term in July.

The last comment I have, you Honor, is regarding a case that was

cited in the last set of papers exchanged by the parties, and that is an NLRB decision called Illinois Coil Spring Company. First of all, your Honor, the context in which that case was cited is to support Concrete Pipe's contention that it would have not had to bargain with the unions involved if the plant at Shafter had been moved to another location. Illinois Coil Spring Company is a National Labor Relations Board Decision, not a court decision. However, the dissent in there very ably points out how the Board's decision is inconsistent with the United States Supreme Court case of Fiber Products, which held in an analogous situation that there is a duty for mandatory collective bargaining in such a situation. And also, the dissent in that case cites numerous previous NLRB decisions with which the Illinois Coil Spring Company case is inconsistent.

No further comments, you Honor, unless you have questions.

THE COURT: All right. Thank you, Mr. Beers.

Anything further, Mr. Murphy?

MR. MURPHY: One or two, your Honor.

I think your concern, as I sense it here, is: Do you have the right to determine the factual issues in this case? I figure that this is analogous to decisions that come before you all the time. I'm sure there are many people, parties come before you to determine whether they are bound to arbitrate under a contract, and you're quite familiar with the fact that you have to determine the threshold issue as to whether they have contractually obligated themselves to arbitrate, and, if they have, then you go arbitrate all the facts.

Basically, we are saying there is no contract here requiring us to arbitrate. This statute doesn't require us to arbitrate, because this statute doesn't apply to withdrawals that occurred before 1980; May of 1980, to be precise. And I think that that is a clear analogy to the normal cases to compel arbitration that come before this court. It's a determination whether there's a threshold requirement that you go to arbitration. And I don't think the Congress said that people who withdrew before 1980 have to go to arbitration. I think they said that people who withdrew after April 29, 1980, do, but those who did before that point do not have to. And that's why we think that this factual dispute is properly before you.

And then, of course, our position is that the Ninth Circuit Court of Appeals' Shelter Framing decision is in fact controlling, because it did

in fact determine most of the elements of these substantive due-process claims, and the Ninth Circuit determined those adversely to the pension trust, and the Ninth Circuit is, of course, controlling in this district.

Thank you, your Honor.

THE COURT: All right. Thank you, Mr. Murphy and Mr. Beers. The matter —

MR. BEERS: Your Honor, just one sentence of clarification?

THE COURT: I think we must stop the ceaseless oscillation of argument, gentlemen. The matter will stand submitted.

MR. BEERS: Thank you, your Honor.

CERTIFICATE

I certify that the forgoing is a true and correct transcript from the stenographic record of proceedings in the foregoing matter.

Don Mehler, Official Reporter — June 26, 1984

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BOARD OF TRUSTEES OF THE CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA, Plaintiff-Appellee, v. CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC., Defendant-Appellant.	No. CV 89-55854 D.C. No. CV-82-5184-HLH **O R D E R**

Before: HUG, NORRIS, and LEAVY, Circuit Judges

The panel, as constituted above, has voted unanimously to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. p. 35(b).

The petition for rehearing is **DENIED**, and the suggestion for a rehearing en bac is **REJECTED**.

Sept. 24, 1991

29 U.S.C. § 1381. Withdrawal liability established; criteria and definitions

(a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

(b) For purposes of subsection (a) of this section —

(1) The withdrawal liability of an employer to a plan is the amount determined under section 1391 of this title to be the allocable amount of unfunded vested benefits, adjusted —

(A) first, by any de minimis reduction applicable under section 1389 of this title,

(B) next, in the case of a partial withdrawal, in accordance with section 1386 of this title,

(C) then, to the extent necessary to reflect the limitation on annual payments under section 1399(c)(1)(B) of this title, and

(D) finally, in accordance with section 1405 of this title.

(2) The term "complete withdrawal" means a complete withdrawal described in section 1383 of this title.

(3) The term "partial withdrawal" means a partial withdrawal described in section 1385 of this title.

(Pub. L. 93-406, Title IV, § 4201, as added Pub. L. 96-364, Title I, § 104(2), Sept. 26, 1980, 94 Stat. 1217.)

29 U.S.C. § 1382. Determination and collection of liability; notification of employer

When an employer withdraws from a multiemployer plan, the plan sponsor, in accordance with this part, shall —

(1) determine the amount of the employer's withdrawal liability,

(2) notify the employer of the amount of the withdrawal liability, and

(3) collect the amount of the withdrawal liability from the employer.

(Pub. L. 93-406, Title IV, § 4202, as added Pub. L. 96-364, Title I, § 104(2), Sept. 26, 1980, 94 Stat. 1218.)

29 U.S.C. § 1383. Complete Withdrawal

(a) Determinative factors

For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer—

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

(b) Building and construction industry

(1) Notwithstanding subsection (a) of this section, in the case of an employer that has an obligation to contribute under a plan for work performed in the building and construction industry, a complete withdrawal occurs only as described in paragraph (2), if —

(A) substantially all the employees with respect to whom the employer has an obligation to contribute under the plan perform work in the building and construction industry, and

(B) the plan —

(i) primarily covers employees in the building and construction industry, or

(ii) is amended to provide that this subsection applies to employers described in this paragraph.

(2) A withdrawal occurs under this paragraph if —

(A) an employer ceases to have an obligation to contribute under the plan, and

(B) the employer —

(i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or

(ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

(3) In the case of a plan terminated by mass withdrawal (within the meaning of section 1341a(a)(2) of this title), paragraph (2) shall be applied by substituting "3 years" for "5 years" in subparagraph (B)(ii).

(c) Entertainment industry

(1) Notwithstanding subsection (a) of this section, in the case of an employer that has an obligation to contribute under a plan for work performed in the entertainment industry, primarily on a temporary or project-by-project basis, if the plan primarily covers employees in the entertainment industry, a complete withdrawal occurs only as described in subsection (b)(2) of this section applied by substituting "plan" for "collective bargaining agreement" in subparagraph (B)(i) thereof.

(2) For purposes of this subsection, the term "entertainment industry" means—

(A) theater, motion picture (except to the extent provided in

regulations prescribed by the corporation), radio, television, sound or visual recording, music, and dance, and

(B) such other entertainment activities as the corporation may determine to be appropriate.

(3) The corporation may by regulation exclude a group or class of employers described in the preceding sentence from the application of this subsection if the corporation determines that such exclusion is necessary —

(A) to protect the interest of the plan's participants and beneficiaries, or

(B) to prevent a significant risk of loss to the corporation with respect to the plan.

(4) A plan may be amended to provide that this subsection shall not apply to a group or class of employers under the plan.

(d) Other determinative factors

(1) Notwithstanding subsection (a) of this section, in the case of an employer who —

(A) has an obligation to contribute under a plan described in paragraph (2) primarily for work described in such paragraph, and

(B) does not continue to perform work within the jurisdiction of the plan,

a complete withdrawal occurs only as described in paragraph (3).

(2) A plan is described in this paragraph if substantially all of the contributions required under the plan are made by employers primarily engaged in the long and short haul trucking industry, the household goods moving industry, or the public warehousing industry.

(3) A withdrawal occurs under this paragraph if —

(A) an employer permanently ceases to have an obligation to contribute under the plan or permanently ceases all covered operations under the plan, and

(B) either —

(i) the corporation determines that the plan has suffered substantial damage to its contribution base as a result of such cessation, or

(ii) the employer fails to furnish a bond issued by a corporate surety company that is an acceptable surety for purposes of section 1112 of this title, or an amount held in escrow by a bank or similar financial institution satisfactory to the plan, in an amount

equal to 50 percent of the withdrawal liability of the employer.

(4) If, after an employer furnishes a bond or escrow to a plan under paragraph (3)(B)(ii), the corporation determines that the cessation of the employer's obligation to contribute under the plan (considered together with any cessations by other employers), or cessation of covered operations under the plan, has resulted in substantial damage to the contribution base of the plan, the employer shall be treated as having withdrawn from the plan on the date on which the obligation to contribute or covered operations ceased, and such bond or escrow shall be paid to the plan. The corporation shall not make a determination under this paragraph more than 60 months after the date on which such obligation to contribute or covered operation ceased.

(5) If the corporation determines that the employer has no further liability under the plan either —

(A) because it determines that the contribution base of the plan has not suffered substantial damage as a result of the cessation of the employer's obligation to contribute or cessation of covered operations (considered together with any cessation of contribution obligation, or of covered operations, with respect to other employers), or

(B) because it may not make a determination under paragraph (4) because of the last sentence thereof,

then the bond shall be cancelled or the escrow refunded.

(6) Nothing in this subsection shall be construed as a limitation on the amount of the withdrawal liability of any employer.

(e) Date of complete withdrawal

For purposes of this part, the date of a complete withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operations.

(f) Special liability withdrawal rules for industries other than construction and entertainment industries; procedures applicable to amend plans

(1) The corporation may prescribe regulations under which plans in industries other than the construction or entertainment industries may be amended to provide for special withdrawal liability rules similar to the rules described in subsections (b) and (c) of this section.

(2) Regulations under paragraph (1) shall permit use of special withdrawal liability rules —

(A) only in industries (or portions thereof) in which, as determined by the corporation, the characteristics that would make use of such rules appropriate are clearly shown, and

(B) only if the corporation determines, in each instance in which special withdrawal liability rules are permitted, that use of such rules will not pose a significant risk to the corporation under this subchapter.

(Pub. L. 93-406, Title IV, § 4203, as added Pub. L. 96-364, Title I, §104(2), Sept. 26, 1980, 94 Stat. 1218.)

29 U.S.C. § 1387. Reduction or waiver of complete withdrawal liability; procedures and standards applicable

(a) The corporation shall provide by regulation for the reduction or waiver of liability for a complete withdrawal in the event that an employer who has withdrawn from a plan subsequently resumes covered operations under the plan or renews an obligation to contribute under the plan, to the extent that the corporation determines that reduction or waiver of withdrawal liability is consistent with the purposes of this chapter.

(b) The corporation shall prescribe by regulation a procedure and standards for the amendment of plans to provide alternative rules for the reduction or wiaver of liability for a complete withdrawal in the event that an employer who has withdrawn from the plan subsequently resumes covered operations or renews an obligation to contribute under the plan. The rules may apply only to the extent that the rules are consistent with the purposes of this chapter.

(Pub. L. 93-406, Title IV, § 4207, as added Pub. L. 96-364, Title I, §104(2), Sept. 26, 1980, 94 Stat. 1223.)

29 U.S.C. § 1391. Methods for computing withdrawal liability

(a) Determination of amount of unfunded vested benefits allocable to employer withdrawn from plan.

The amount of the unfunded vested benefits allocable to an employer that withdraws from a plan shall be determined in accordance with subsection (b), (c), or (d) of this section.

(b) Factors determining computation of amount of unfunded vested benefits allocable to employer withdrawn from plan

(1) Except as provided in subsections (c) and (d) of this section, the amount of unfunded vested benefits allocable to an employer that withdraws is the sum of —

(A) the employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits for plan years ending after September 25, 1980, as determined under paragraph (2),

(B) the employer's proportional share, if any, of the unamortized amount of the plan's unfunded vested benefits at the end of the plan year ending before September 26, 1980, as determined under paragraph (3); and

(C) the employer's proportional share of the unamortized amounts of the reallocated unfunded vested benefits (if any) as determined under paragraph (4).

If the sum of the amounts determined with respect to an employer under paragraphs (2), (3), and (4) is negative, the unfunded vested benefits allocable to the employer shall be zero.

(2) (A) An employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits for the plan years ending after September 25, 1980, is the sum of the employer's proportional shares of the unamortized amount of the change in unfunded vested benefits for each plan year in which the employer has an obligation to contribute under the plan ending —

(i) after such date, and

(ii) before the plan year in which the withdrawal of the employer occurs.

(B) The change in a plan's unfunded vested benefits for a plan year is the amount by which —

(i) the unfunded vested benefits at the end of the plan year; exceeds

(ii) the sum of —

(I) the unamortized amount of the unfunded vested benefits for the last plan year ending before September 26, 1980, and

(II) the sum of the unamortized amounts of the change in unfunded vested benefits for each plan year ending after September 25, 1980, and preceding the plan year for which the change is determined.

(C) The unamortized amount of the change in a plan's unfunded vested benefits with respect to a plan year is the change in unfunded vested benefits for the plan year, reduced by 5 percent of such change for each succeeding plan year.

(D) The unamortized amount of the unfunded vested benefits for the

last plan year ending before September 26, 1980, is the amount of the unfunded vested benefits as of the end of that plan year reduced by 5 percent of such amount for each succeeding plan year.

(E) An employer's proportional share of the unamortized amount of a change in unfunded vested benefits is the product of —

(i) the unamortized amount of such change (as of the end of the plan year preceding the plan year in which the employer withdraws); multiplied by

(ii) a fraction —

(I) the numerator of which is the sum of the contributions required to be made under the plan by the employer for the year in which such change arose and for the 4 preceding plan years, and

(II) the denominator of which is the sum for the plan year in which such change arose and the 4 preceding plan years of all contributions made by employers who had an obligation to contribute under the plan for the plan year in which such change arose reduced by the contributions made in such years by employers who had withdrawn from the plan in the year in which the change arose.

(3) An employer's proportional share of the unamortized amount of the plan's unfunded vested benefits for the last plan year ending before September 26, 1980, is the product of —

(A) such unamortized amount; multiplied by —

(B) a fraction —

(i) the numerator of which is the sum of all contributions required to be made by the employer under the plan for the most recent 5 plan years ending before September 26, 1980, and

(ii) the denominator of which is the sum of all contributions made for the most recent 5 plan years ending before September 26, 1980, by all employers —

(I) who had an obligation to contribute under the plan for the first plan year ending on or after such date, and

(II) who had not withdrawn from the plan before such date.

(4) (A) An employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits is the sum of the employer's proportional shares of the unamortized amount of the reallocated unfunded vested benefits for each plan year ending before the plan year in which the employer withdrew from the plan.

(B) Except as otherwise provided in regulations prescribed by the corporation, the reallocated unfunded vested benefits for a plan year is the sum of —

(i) any amount which the plan sponsor determines in that plan year to be uncollectible for reasons arising out of cases or proceedings under Title 11, or similar proceedings.

(ii) any amount which the plan sponsor determines in that plan year will not be assessed as a result of the operation of section 1389, 1399(c)(1)(B), or section 1405 of this title against an employer to whom a notice described in section 1399 of this title has been sent, and

(iii) any amount which the plan sponsor determines to be uncollectible or unassessable in that plan year for other reasons under standards not inconsistent with regulations prescribed by the corportion.

(C) The unamortized amount of the reallocated unfunded vested benefits with respect to a plan year is the reallocated unfunded vested benefits for the plan year, reduced by 5 percent of such reallocated unfunded vested benefits for each succeeding plan year.

(D) An employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits with respect to a plan year is the product of —

(i) the unamortized amount of the reallocated unfunded vested benefits (as of the end of the plan year preceding the plan year in which the employer withdraws); multiplied by

(ii) the fraction defined in paragraph (2)(E)(ii).

(c) Amendment of multiemployer plan for determination respecting amount of unfunded vested benefits allocable to employer withdrawn from plan; factors determining computation of amount

(1) A multiemployer plan, other than a plan which primarily covers employees in the building and construction industry, may be amended to provide that the amount of unfunded vested benefits allocable to an employer that withdraws from the plan is an amount determined under paragraph (2), (3), (4), or (5) of this subsection, rather than under subsection (b) or (d) of this section. A plan described in section 1383(b)(1)(B)(i) of this title (relating to the building and construction industry) may be amended, to the extent provided in regulations prescribed by the corporation, to provide that the amount of the

unfunded vested benefits allocable to an employer not described in section 1383(b)(1)(A) of this title shall be determined in a manner different from that provided in subsection (b) of this section.

(2) (A) The amount of the unfunded vested benefits allocable to any employer under this paragraph is the sum of the amounts determined under subparagraphs (B) and (C).

(B) The amount determined under this subparagraph is the product of —

(i) the plan's unfunded vested benefits as of the end of the last plan year ending before September 26, 1980, reduced as if those obligations were being fully amortized in level annual installments over 15 years beginning with the first plan year ending on or after such date; multiplied by

(ii) a fraction —

(I) the numerator of which is the sum of all contributions required to be made by the employer under the plan for the last 5 plan years ending before September 26, 1980, and

(II) the denominator of which is the sum of all contributions made for the last 5 plan years ending before September 26, 1980, by all employers who had an obligation to contribute under the plan for the first plan year ending after September 25, 1980, and who had not withdrawn from the plan before such date.

(C) The amount determined under this subparagraph is the product of —

(i) an amount equal to —

(I) the plan's unfunded vested benefits as of the end of the plan year preceding the plan year in which the employer withdraws, less

(II) the sum of the value as of such date of all outstanding claims for withdrawal liability which can reasonably be expected to be collected, with respect to employers withdrawing before such plan year, and that portion of the amount determined under subparagraph (B)(i) which is allocable to employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which the employer withdraws and who also had an obligation to contribute under the plan for the first plan year ending after September 25, 1980; multiplied by

(ii) a fraction —

(I) the numerator of which is the total amount required to be contributed under the plan by the employer for the last 5 plan years ending before the date on which the employer withdraws, and

(II) the denominator of which is the total amount contributed under the plan by all employers for the last 5 plan years ending before the date on which the employer withdraws, increased by the amount of any employer contributions owed with respect to earlier periods which were collected in those plan years, and decreased by any amount contributed by an employer who withdrew from the plan under this part during those plan years.

(D) The corporation may by regulation permit adjustment in any denominator under this section consistent with the purposes of this subchapter, where such adjustment would be appropriate to ease administrative burdens of plan sponsors in calculating such denominators.

(3) The amount of the unfunded vested benefits allocable to an employer under this paragraph is the product of —

(A) the plan's unfunded vested benefits as of the end of the plan year preceding the plan year in which the employer withdraws, less the value as of the end of such year of all outstanding claims for withdrawal liability which can reasonably be expected to be collected from employers withdrawing before such year; multiplied by

(B) a fraction —

(i) the numerator of which is the total amount required to be contributed by the employer under the plan for the last 5 plan years ending before the withdrawal, and

(ii) the denominator of which is the total amount contributed under the plan by all employers for the last 5 plan years ending before the withdrawal, increased by any employer contributions owed with respect to earlier periods which were collected in those plan years, and decreased by any amount contributed to the plan during those plan years by employers who withdrew from the plan under this section during those plan years.

(4) (A) The amount of the unfunded vested benefits allocable to an employer under this paragraph is equal to the sum of —

(i) the plan's unfunded vested benefits which are attributable to

participants' service with the employer (determined as of the end of the plan year preceding the plan year in which the employer withdraws), and

(ii) the employer's proportional share of any unfunded vested benefits which are not attributable to service with the employer or other employers who are obligated to contribute under the plan in the plan year preceding the plan year in which the employer withdraws (determined as of the end of the plan year preceding the plan year in which the employer withdraws).

(B) The plan's unfunded vested benefits which are attributable to participants' service with the employer is the amount equal to the value of nonforfeitable benefits under the plan which are attributable to participants' service with such employer (determined under plan rules not inconsistent with regulations of the corporation) decreased by the share of plan assets determined under subparagraph (C) which is allocated to the employer as provided under subparagraph (D).

(C) The value of plan assets determined under this subparagraph is the value of plan assets allocated to nonforfeitable benefits which are attributable to service with the employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which the employer withdraws, which is determined by multiplying —

(i) the value of the plan assets as of the end of the plan year preceding the plan year in which the employer withdraws, by

(ii) a fraction —

(I) the numerator of which is the value of nonforfeitable benefits which are attributable to service with such employers, and

(II) the denominator of which is the value of all nonforfeitable benefits under the plan

as of the end of the plan year.

(D) The share of plan assets, determined under subparagraph (C), which is allocated to the employer shall be determined in accordance with one of the following methods which shall be adopted by the plan by amendment:

(i) by multiplying the value of plan assets determined under subparagraph (C) by a fraction —

(I) the numerator of which is the value of the nonforfeitable benefits which are attributable to service with the employer, and

(II) the denominator of which is the value of the nonforfeitable benefits which are attributable to service with all employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which the employer withdraws;

(ii) by multiplying the value of plan assets under subparagraph (C) by a fraction —

(I) the numerator of which is the sum of all contributions (accumulated with interest) which have been made to the plan by the employer for the plan year preceding the plan year in which the employer withdraws and all the preceding plan years; and

(II) the denominator of which is the sum of all contributions (accumulated with interest) which have been made to the plan (for the plan year preceding the plan year in which the employer withdraws and all preceding plan years) by all employers who have an obligation to contribute to the plan for the plan year preceding the plan year in which the employer withdraws; or

(iii) by multiplying the value of plan assets under subparagraph (C) by a fraction —

(I) the numerator of which is the amount determined under clause (ii)(I) of this subparagraph, less the sum of benefit payments (accumulated with interest) made to participants (and their beneficiaries) for the plan years described in such clause (ii)(I) which are attributable to service with the employer; and

(II) the denominator of which is the amount determined under clause (ii)(II) of this subparagraph, reduced by the sum of benefit payments (accumulated with interest) made to participants (and their beneficiaries) for the plan years described in such clause (ii)(II) which are attributable to service with respect to the employers described in such clause (ii)(II).

(E) The amount of the plan's unfunded vested benefits for a plan year preceding the plan year in which an employer withdraws, which is not attributable to service with employers who have an obligation to contribute under the plan in the plan year preceding the plan year in which such employer withdraws is equal to —

(i) an amount equal to —

(I) the value of all nonforfeitable benefits under the plan at the end of such plan year, reduced by

(II) the value of nonforfeitable benefits under the plan at the

end of such plan year which are attributable to participants' service with employers who have an obligation to contribute under the plan for such plan year; reduced by

(ii) an amount equal to —

(I) the value of the plan assets as of the end of such plan year, reduced by

(II) the value of plan assets as of the end of such plan year as determined under subparagraph (C); reduced by

(iii) the value of all outstanding claims for withdrawal liability which can reasonably be expected to be collected with respect to employers withdrawing before the year preceding the plan year in which the employer withdraws.

(F) The employer's proportional share described in subparagraph (A)(ii) for a plan year is the amount determined under subparagraph (E) for the employer, but not in excess of an amount which bears the same ratio to the sum of the amounts determined under subparagraph (E) for all employers under the plan as the amount determined under subparagraph (C) for the employer bears to the sum of the amounts determined under subparagraph (C) for all employers under the plan.

(G) The corporation may prescribe by regulation other methods which a plan may adopt for allocating assets to determine the amount of the unfunded vested benefits attributable to service with the employer and to determine the employer's share of unfunded vested benefits not attributable to service with employers who have an obligation to contribute under the plan in the plan year in which the employer withdraws.

(5) (A) The corporation shall prescribe by regulation a procedure by which a plan may, by amendment, adopt any other alternative method for determining an employer's allocable share of unfunded vested benefits under this section, subject to the approval of the corporation based on its determination that adoption of the method by the plan would not significantly increase the risk of loss to plan participants and beneficiaries or to the corporation.

(B) The corporation may prescribe by regulation standard approaches for alternative methods, other than those set forth in the preceding paragraphs of this subsection, which a plan may adopt under subparagraph (A), for which the corporation may waive or modify the approval requirements of subparagraph (A). Any alternative method

shall provide for the allocation of substantially all of a plan's unfunded vested benefits among employers who have an obligation to contribute under the plan.

(C) Unless the corporation by regulation provides otherwise, a plan may be amended to provide that a period of more than 5 but not more than 10 plan years may be used for determining the numerator and denominator of any fraction which is used under any method authorized under this section for determining an employer's allocable share of unfunded vested benefits under this section.

(D) The corporation may by regulation permit adjustments in any denominator under this section, consistent with the purposes of this subchapter, where such adjustment would be appropriate to ease administrative burdens of plan sponsors in calculating such denominators.

(d) Method of calculating allocable share of employer of unfunded vested benefits set forth in subsection (c)(3) of this section; applicability of certain statutory provisions

(1) The method of calculating an employer's allocable share of unfunded vested benefits set forth in subsection (c)(3) of this section shall be the method for calculating an employer's allocable share of unfunded vested benefits under a plan to which section 404(c) of Title 26, or a continuation of such a plan, applies, unless the plan is amended to adopt another method authorized under subsection (b) or (c) of this section.

(2) Sections 1384, 1389, 1399(c)(1)(B), and 1405 of this title shall not apply with respect to the withdrawal of an employer from a plan described in paragraph (1) unless the plan is amended to provide that any of such sections apply.

(e) Reduction of liability of withdrawn employer in case of transfer of liabilities to another plan incident to withdrawal or partial withdrawal of employer

In the case of a transfer of liabilities to another plan incident to an employer's withdrawal or partial withdrawal, the withdrawn employer's liability under this part shall be reduced in an amount equal to the value, as of the end of the last plan year ending on or before the date of the withdrawal, of the transferred unfunded vested benefits.

(f) Computations applicable in case of withdrawal following merger of multiemployer plans

In the case of a withdrawal following a merger of multiemployer plans, subsection (b), (c), or (d) of this section shall be applied in accordance with regulations prescribed by the corporation; except that, if a withdrawal occurs in the first plan year beginning after a merger of multiemployer plans, the determination under this section shall be made as if each of the multiemployer plans had remained separate plans.

(Pub. L. 93-406, Title IV, § 4211, as added Pub. L. 96-364, Title I § 104(2), Sept. 26, 1980, 94 Stat. 1226, and amended Pub. L. 98-369, Title V, § 558(b)(1)(A), (B), July 18, 1984, 98 Stat. 899; Pub. L. 101-239, Title VII, § 7891(a)(1), Dec. 19, 1989, 103 Stat. 2445.)

29 U.S.C. § 1392. Obligation to contribute

(a) Definition

For purposes of this part, the term "obligation to contribute" means an obligation to contribute arising —

(1) under one or more collective bargaining (or related) agreements, or

(2) as a result of a duty under applicable labor-management relations law, but

does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.

(b) Payments of withdrawal liability not considered contributions

Payments of withdrawal liability under this part shall not be considered contributions for purposes of this part.

(c) Transactions to evade or avoid liability

If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction.

(Pub. L. 93-406, Title IV, § 4212, as added Pub. L. 96-364, Title I, § 104(2), Sept. 26, 1980, 94 Stat. 1233.)

29 U.S.C. § 1393. Actuarial assumptions

(a) Use by plan actuary in determining unfunded vested benefits of a plan for computing withdrawal liability of employer

The corporation may prescribe by regulation actuarial assumptions which may be used by a plan actuary in determining the unfunded vested benefits of a plan for purposes of determining an employer's withdrawal liability under this part. Withdrawal liability under this part shall be determined by each plan on the basis of —

(1) actuarial assumptions and methods which, in the aggregate, are

reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan, or

(2) actuarial assumptions and methods set forth in the corporation's regulations for purposes of determining an employer's withdrawal liability.

(b) Factors determinative of unfunded vested benefits of plan for computing withdrawal liability of employer

In determining the unfunded vested benefits of a plan for purposes of determining an employer's withdrawal liability under this part, the plan actuary may —

(1) rely on the most recent complete actuarial valuation used for purposes of section 412 of Title 26 and reasonable estimates for the interim years of the unfunded vested benefits, and

(2) in the absence of complete data, rely on the data available or on data secured by a sampling which can reasonably be expected to be representative of the status of the entire plan.

(c) Determination of amount of unfunded vested benefits

For purposes of this part, the term "unfunded vested benefits" means with respect to a plan, an amount equal to —

(A) the value of nonforfeitable benefits under the plan, less

(B) the value of the assets of the plan.

(Pub. L. 93-406, Title IV, § 4213, as added Pub. L. 96-364, Title I, § 104(2), Sept. 26, 1980, 94 Stat. 1233, and amended Pub. L. 101-239, Title VII, § 7891(a)(1), Dec. 19, 1989, 103 Stat. 2445.)

29 U.S.C. § 1397. Application of part in case of certain pre-1980 withdrawals; adjustment of covered plan

(a) For the purpose of determining the amount of unfunded vested benefits allocable to an employer for a partial or complete withdrawal from a plan which occurs after September 25, 1980, and for the purpose of determining whether there has been a partial withdrawal after such date, the amount of contributions, and the number of contribution base units, of such employer properly allocable —

(1) to work performed under a collective bargaining agreement for which there was a permanent cessation of the obligation to contribute before September 26, 1980, or

(2) to work performed at a facility at which all covered operations permanently ceased before September 26, 1980, or for which there

was a permanent cessation of the obligation to contribute before that date,

shall not be taken into account.

(b) A plan may, in a manner not inconsistent with regulations, which shall be prescribed by the corporation, adjust the amount of unfunded vested benefits allocable to other employers under a plan maintained by an employer described in subsection (a) of this section.

(Pub. L. 93-406, Title IV, § 4217, as added Pub. L. 96-364, Title I, § 104(2), Sept. 26, 1980, 94 Stat. 1235, and amended Pub. L. 92-369, Title V, § 558(b)(1)(A), (B), July 18, 1984, 98 Stat. 899.)

29 U.S.C. § 1399. Notice, collection, etc., of withdrawal liability

(a) Furnishing of information by employer to plan sponsor

An employer shall, within 30 days after a written request from the plan sponsor, furnish such information as the plan sponsor reasonably determines to be necessary to enable the plan sponsor to comply with the requirements of this part.

(b) Notification, demand for payment, and review upon complete or partial withdrawal by employer

(1) As soon as practicable after an employer's complete or partial withdrawal, the plan sponsor shall —

(A) notify the employer of —

(i) the amount of the liability, and

(ii) the schedule for liability payments, and

(B) demand payment in accordance with the schedule.

(2) (A) No later than 90 days after the employer receives the notice described in paragraph (1), the employer —

(i) may ask the plan sponsor to review any specific matter relating to the determination of the employer's liability and the schedule of payments,

(ii) may identify any inaccuracy in the determination of the amount of the unfunded vested benefits allocable to the employer, and

(iii) may furnish any additional relevant information to the plan sponsor.

(B) After a reasonable review of any matter raised, the plan sponsor shall notify the employer of —

(i) the plan sponsor's decision,

(ii) the basis for the decision, and

(iii) the reason for any change in the determination of the employer's

liability or schedule of liability payments.

(c) Payment requirements; amount, etc.

(1) (A) (i) Except as provided in subparagraphs (B) and (D) of this paragraph and in paragraphs (4) and (5), an employer shall pay the amount determined under section 1391 of this title, adjusted if appropriate first under section 1389 of this title and then under section 1386 of this title over the period of years necessary to amortize the amount in level annual payments determined under subparagraph (C), calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs and as if each subsequent payment were made of the first day of each subsequent plan year. Actual payment shall commence in accordance with paragraph (2).

(ii) The determination of the amortization period described in clause (i) shall be based on the assumptions used for the most recent actuarial valuation for the plan.

(B) In any case in which the amortization period described in subparagraph (A) exceeds 20 years, the employer's liability shall be limited to the first 20 annual payments determined under subparagraph (C).

(C) (i) Except as provided in subparagraph (E), the amount of each annual payment shall be the product of —

(I) the average annual number of contribution base units for the period of 3 consecutive plan years, during the period of 10 consecutive plan years ending before the plan year in which the withdrawal occurs, in which the number of contribution base units for which the employer had an obligation to contribute under the plan is the highest, and

(II) the highest contribution rate at which the employer had an obligation to contribute under the plan during the 10 plan years ending with the plan year in which the withdrawal occurs.

For purposes of the preceding sentence, a partial withdrawal described in section 1385(a)(1) of this title shall be deemed to occur on the last day of the first year of the 3-year testing period described in section 1385(b)(1)(B)(i) of this title.

(ii) (I) A plan may be amended to provide that for any plan year ending before 1986 the amount of each annual payment shall be (in lieu of the amount determined under the clause (i)) the average of the required employer contributions under the plan for the period of 3 consecutive

plan years (during the period of 10 consecutive plan years ending with the plan year preceding the plan year in which the withdrawal occurs) for which such required contributions were the highest.

(II) Subparagraph (B) shall not apply to any plan year to which this clause applies

(III) This clause shall not apply in the case of any withdrawal described in subparagraph (D).

(IV) If under a plan this clause applies to any plan year but does not apply to the next plan year, this clause shall not apply to any plan year after such next plan year.

(V) For purposes of this clause, the term "required contributions" means, for any period, the amounts which the employer was obligated to contribute for such period (not taking into account any delinquent contribution for any other period).

(iii) A plan may be amended to provide that for the first plan year ending on or after September 26, 1980, the number "5" shall be substituted for the number "10" each place it appears in clause (i) or clause (ii) (whichever is appropriate). If the plan is so amended, the number "5" shall be increased by one for each succeeding plan year until the number "10" is reached.

(D) In any case in which a multiemployer plan terminates by the withdrawal of every employer from the plan, or in which substantially all the employers withdraw from a plan pursuant to an agreement or arrangement to withdraw from the plan —

(i) the liability of each such employer who has withdrawn shall be determined (or redetermined) under this paragraph without regard to subparagraph (B), and

(ii) notwithstanding any other provision of this part, the total unfunded vested benefits of the plan shall be fully allocated among all such employers in a manner not inconsistent with regulations which shall be prescribed by the corporation.

Withdrawal by an employer from a plan, during a period of 3 consecutive plan years within which substantially all the employers who have an obligation to contribute under the plan withdraw, shall be presumed to be a withdrawal pursuant to an agreement or arrangement, unless the employer proves otherwise by a preponderance of the evidence.

(E) In the case of a partial withdrawal described in section 1385(a) of this title, the amount of each annual payment shall be the product of —

(i) the amount determined under subparagraph (C) (determined without regard to this subparagraph), multiplied by

(ii) the fraction determined under section 1386(a)(2) of this title.

(2) Withdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor under subsection (b)(1) of this section beginning no later than 60 days after the date of the demand notwithstanding any request for review or appeal of determinations of the amount of such liability or of the schedule.

(3) Each annual payment determined under paragraph (1)(C) shall be payable in 4 equal installments due quarterly, or at other intervals specified by plan rules. If a payment is not made when due, interest on the payment shall accrue from the due date until the date on which the payment is made.

(4) The employer shall be entitled to prepay the outstanding amount of the unpaid annual withdrawal liability payments determined under paragraph (1)(C), plus accrued interest, if any, in whole or in part, without penalty. If the prepayment is made pursuant to a withdrawal which is later determined to be part of a withdrawal described in paragraph (1)(D), the withdrawal liability of the employer shall not be limited to the amount of the prepayment.

(5) In the event of a default, a plan sponsor may require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest on the total outstanding liability from the due date of the first payment which was not timely made. For purposes of this section, the term "default" means —

(A) the failure of an employer to make, when due, any payment under this section, if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of such failure, and

(B) any other event defined in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability.

(6) Except as provided in paragraph (1)(A)(ii), interest under this subsection shall be charged at rates based on prevailing market rates for comparable obligations, in accordance with regulations prescribed by the corporation.

(7) A multiemployer plan may adopt rules for other terms and conditions for the satisfaction of an employer's withdrawal liability if such

rules —

(A) are consistent with this chapter, and

(B) are not inconsistent with regulations of the corporation.

(8) In the case of a terminated multiemployer plan, an employer's obligation to make payments under this section ceases at the end of the plan year in which the assets of the plan (exclusive of withdrawal liability claims) are sufficient to meet all obligations of the plan, as determined by the corporation.

(d) Applicability of statutory prohibitions

The prohibitions provided in section 1106(a) of this title do not apply to any action required or permitted under this part.

(Pub. L. 93-406, Title IV, § 4219, as added Pub. L. 96-364, Title I, § 104(2), Sept. 26, 1980, 94 Stat. 1236, and amended Pub. L. 98-369, Title V, § 558(b)(1)(B), July 18, 1984, 98 Stat. 899.)

29 U.S.C. § 1401. Resolution of disputes

(a) Arbitration proceedings; matters subject to arbitration, procedures applicable, etc.

(1) Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 of this title shall be resolved through arbitration. Either party may initiate the arbitration proceeding within a 60-day period after the earlier of —

(A) the date of notification to the employer under section 1399(b)(2)(B) or this title, or

(B) 120 days after the date of the employer's request under section 1399(b)(2)(A) of this title.

The parties may jointly initiate arbitration within the 180-day period after the date of the plan sponsor's demand under section 1399(b)(1) of this title.

(2) An arbitration proceeding under this section shall be conducted in accordance with fair and equitable procedures to be promulgated by the corporation. The plan sponsor may purchase insurance to cover potential liability of the arbitrator. If the parties have not provided for the costs of the arbitration, including arbitrator's fees, by agreement, the arbitrator shall assess such fees. The arbitrator may also award reasonable attorney's fees.

(3) (A) For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 1381 through 1399

of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

(B) In the case of the determination of a plan's unfunded vested benefits for a plan year, the determination is presumed correct unless a party contesting the determination shows by a preponderance of evidence that —

(i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or

(ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods.

(b) Alternative collection proceedings; civil action subsequent to arbitration award; conduct of arbitration proceedings

(1) If no arbitration proceeding has been initiated pursuant to subsection (a) of this section, the amounts demanded by the plan sponsor under section 1399(b)(1) of this title shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.

(2) Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the issuance of an arbitrator's award, in an appropriate United States district court in accordance with section 1451 of this title to enforce, vacate, or modify the arbitrator's award.

(3) Any arbitration proceedings under this section shall, to the extent consistent with this subchapter, be conducted in the same manner, subject to the same limitations, carried out with the same powers (including subpena power), and enforced in United States courts as an arbitration proceeding carried out under Title 9.

(c) Presumption respecting finding of fact by arbitrator

In any proceeding under subsection (b) of this section, there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct.

(d) Payments by employer prior and subsequent to determination by arbitrator; adjustments; failure of employer to make payments

Payments shall be made by an employer in accordance with the determinations made under this part until the arbitrator issues a final

decision with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination. If the employer fails to make timely payment in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of section 1145 of this title).

(e) Furnishing of information by plan sponsor to employer respecting computation of withdrawal liability of employer; fees

If any employer requests in writing that the plan sponsor make available to the employer general information necessary for the employer to compute its withdrawal liability with respect to the plan (other than information which is unique to that employer), the plan sponsor shall furnish the information to the employer without charge. If any employer requests in writing that the plan sponsor make an estimate of such employer's potential withdrawal liability with respect to the plan or to provide information unique to that employer, the plan sponsor may require the employer to pay the reasonable cost of making such estimate or providing such information.

(Pub. L. 93-406, Title IV, § 4221, as added Pub. L. 96-364, Title I, § 104(2), Sept. 26, 1980, 94 Stat. 1239.)

29 U.S.C. § 1451. Civil Actions

(a) Persons entitled to maintain actions

(1) A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

(2) Notwithstanding paragraph (1), this section does not authorize an action against the Secretary of the Treasury, the Secretary of Labor, or the corporation.

(b) Failure of employer to make withdrawal liability payment within prescribed time

In any action under this section to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the time prescribed shall be treated in the same manner as a delinquent contribution (within the meaning of

section 1145 of this title).

(c) Jurisdiction of Federal and State courts

The district courts of the United States shall have exclusive jurisdiction of an action under this section without regard to the amount in controversy, except that State courts of competent jurisdiction shall have concurrent jurisdiction over an action brought by a plan fiduciary to collect withdrawal liability.

(d) Venue and service of process

An action under this section may be brought in the district where the plan is administered or where a defendant resides or does business, and process may be served in any district where a defendant resides, does business, or may be found.

(e) Costs and expenses

In any action under this section, the court may award all or a portion of the costs and expenses incurred in connection with such action including, reasonable attorney's fees, to the prevailing party.

(f) Time limitations

An action under this section may not be brought after the later of —

(1) 6 years after the date on which the cause of action arose, or

(2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

(g) Service of complaint on corporation; intervention by corporation

A copy of the complaint in any action under this section or section 1401 of this title shall be served upon the corporation by certified mail. The corporation may intervene in any such action.

(Pub. L. 93-406, Title IV, § 4301, as added Pub. L. 96-364, Title I, § 104(2), Sept. 26, 1980, 94 Stat. 1263.)

AMENDMENT V

GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

29 C.F.R. § 2647.8 Special rules.

(a) *Employer that has withdrawn and reentered the plan before the effective date of this part.* This part shall apply in accordance with the rules in this paragraph, with respect to an eligible employer that completely withdraws from a multiemployer plan after September 25, 1980, and is performing covered work under the plan on the effective date of this part. Upon the application of an employer described in the previous sentence, the plan sponsor of a multiemployer plan shall determine whether the employer satisfies the requirements for abatement of its complete withdrawal liability under this part. Pending the plan sponsor's determination, the employer may provide the plan with a bond or escrow that satisfies the requirements of § 2647.3, in lieu of making its withdrawal liability payments due after its application for an abatement determination. The plan sponsor shall notify the employer in writing of its determination and the consequences of its determination as described in § 2647.2(c) or (d) and (e), as applicable. If the plan sponsor determines that the employer qualifies for abatement, only withdrawal liability payments made prior to the employer's reentry shall be retained by the plan; payments made by the employer after its reentry shall be refunded to the employer, with interest on those made prior to the application for abatement, in accordance with § 2647.2(e)(2). If a bond or escrow has been provided to the plan in accordance with § 2647.3, the plan sponsor shall send a copy of the notice to the bonding or escrow agent. Sections 2647.5-2647.7 shall apply with respect to the employer's subsequent complete withdrawal occurring on or after the effective date of this part, or partial withdrawal occurring either before or after that date. This paragraph shall not negate reasonable actions taken by plans prior to the effective date of this part under plan rules implementing section 4207(a) that were validly adopted pursuant to section 405 of the Multiemployer Act.

(b) *Employer with multiple complete withdrawals that has reentered the plan before effective date of this part.* If an employer described in paragraph (a) of this section has completely withdrawn from a multiemployer plan on two or more occasions before the effective date of this part, the rules in paragraph (a) of this section shall be applied as modified by this paragraph.

(1) The plan sponsor shall determine whether the employer satisfies the requirements for abatement under § 2647.4 based on the most

recent complete withdrawal

(2) If the employer satisfies the requirements for abatement, the employer's liability with respect to all previous complete withdrawals shall be abated.

(3) If the liability is abated, §§ 2647.5 and 2647.6 shall be applied as if the employer's earliest complete withdrawal were its initial complete withdrawal.

(c) *Employers with multiple complete withdrawals that has not reentered the plan as of the effective date of this part.* If an eligible employer has completely withdrawn from a multiemployer plan on two or more occasions between September 26, 1980 and the effective date of this part and is not performing covered work under the plan on the effective date of this regulation, the rules in this part shall apply, subject to the modifications specified in paragraphs (b)(1)-(b)(3) of this section, upon the employers reentry into the plan.

(d) *Combination of withdrawn employer with contributing employer.* If a withdrawn employer merges or otherwise combines with an employer that has an obligation to contribute to the plan from which the first employer withdrew, the combined entity is the eligible employer, and the rules of § 2647.4 shall be applied —

(1) By subtracting from the measurement period contribution base units the contribution base units for which the non-withdrawn portion of the employer was obligated to contribute in the last plan year ending prior to the combination;

(2) By determining the base year contribution base units solely by reference to the contribution base units of the withdrawn portion of the employer; and

(3) By using the date of the combination, rather than the date of resumption of covered operations, to begin the measurement period.

(e) *Combination of two or more withdrawn employers.* If two or more withdrawn employers merge or otherwise combine, the combined entity is the eligible employer, and the rules of § 2647.4 shall be applied by combining the number of contribution base units with respect to which each portion of the employer had an obligation to contribute under the plan for its base year. However, the combined number of contribution base units shall not include contribution base units of a withdrawn portion of the employer that had fully paid its withdrawal liability as of the date of the resumption of covered operations.